IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

WENDELL WARREN AUSTIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
AUTHORITIES	ii
OPINIONS BELOW	1
DATE OF JUDGMENT AND TIME OF ENTRY	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	3(a)
CONCISE STATEMENT OF CASE	4
ARGUMENT	20
CONCLUSION	57

APPENDICES

	Appendix
Order on Motions of Certain Defendants (dated 12/3/70) and Judgment and Commitment (dated 1/13/71) of United States District Court, for the District of Kansas	A
Decision by the Court of Appeals for the Tenth Circuit Affirming the United States District Court of Kansas	B
Order Denying Petition for Rehearing	C
Statutes and Constitutional Provisions Involved	D

TABLE OF AUTHORITIES

Cases	Page
Beckwith v. U.S., 367 F.2d 458	39
Berger v. U.S., 295 U.S. 78, 55 S.Ct. 629	51
Blockburger v. U.S., 284 U.S. 299, 52 S.Ct. 180	35
Boone v. Kerr-McGee Oil Industries, 217 F.2d 63	34
Branch v. Texas, U.S., 33 L.Ed. 346, 92 S.Ct.(69-5053)	46
Brown v. U.S., 150 U.S. 93, 14 S.Ct. 37	38
Bruton v. U.S., 391 U.S. 123	41, 42, 43 52, 54
Burch v. Reading Co., 140 F.Supp. 136, aff'd. 240 F.2d 574, cert. denied, 1957, 353 U.S. 365	41, 42
Cartwright v. U.S., 325 F.2d 919	20
Furman v. Georgia, U.S., 33 L.Ed.2d 346,92 S.Ct.(69-5003)	46
Glazerman v. U.S., 421 F.2d 547 cert. denied, 398 U.S. 928	52, 53 54

Jackson v. Georgia, U.S.,
33 L.Ed. 346, 92 S.Ct.(69-5030) 46

Jackson v. U.S.,
250 F.2d 897 55

Kirby v. U.S.,
174 U.S. 47, 19 S.Ct. 574 34

Kuykendall v. Hunter,
187 F.2d 545 38

Lane, et al. v. U.S.,
34 F.2d 413 38

Lawrence v. U.S.,
357 F.2d 434 41, 42

Lisenba v. California,
314 U.S. 219 42

Maestas v. U.S.,
341 F.2d 493 41

Marshall v. U.S.,
360 U.S. 310 41

Milam v. U.S.,
322 F.2d 104,
cert. denied, Sub nom Kimball
v. U.S., 377 U.S. 911 54

Montoya v. U.S.,
402 F.2d 847 56

Mutual Life Ins. Co. of N.Y.
v. Hillmon,
12 S.Ct. 909, 145 U.S. 285 20

Prudential Ins. Co. of America
v. SEC,
326 F.2d 338, cert. denied,
377 U.S. 953, 83 S.Ct. 1629 48

Radomsky v. U.S.,
180 F.2d 781, 20

Rizzo v. U.S.,
304 F.2d 810, cert. denied,
371 U.S. 890 51, 54

Roe v. U.S.,
289 F.2d 435, cert. denied,
368 U.S. 822 48

SEC v. C.M. Joiner Leasing Corp.,
320 U.S. 344 47, 50

SEC v. Variable Annuity Life
Ins. Co.,
359 U.S. 65, 79 S.Ct. 618 48

SEC v. W. J. Howey Co.,
328 U.S. 293, 66 S.Ct. 1100 48

Smith v. U.S.,
230 F.2d 935 50

Tcheretnin v. Knight,
389 U.S. 332 47

United Brotherhood of Carpenters
and Joiners v. U.S.,
330 U.S. 395, 67 S.Ct. 775 48

U.S. v. Greenberg,
30 F.R.D. 164 35

U.S. v. Hughes,
195 F.Supp.797 35

U.S. v. Smith,
403 F.2d 74 — 41

U.S. v. Tomaiolo,
249 F.2d 683 — 40

White v. U.S.,
415 F.2d 292, cert. denied,
397 U.S. 993 — 51

Constitutions

United States Constitution,

5th Amendment — 43

6th Amendment — 52

8th Amendment — 46

Rules

Fed. Rules of Crim. Procedure,

Rule 8(b) — 53

Rule 14 — 53

Rule 20 — 44

Rule 29(a) — 3, 17, 55
56, 57

Rule 29(b) — 18

Statutes

15 U.S.C.

77(b) — 47

77(q) — 1, 4, 7

15 U.S.C.

78(j) 44

80(b)-6 44

18 U.S.C.

2 1, 4, 7

3 44

1341 4, 7

1343 1, 4, 7

2314(1) 4

2314(2) 4, 7

28 U.S.C.

1254(1) 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

WENDELL WARREN AUSTIN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Wendell Warren Austin petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on June 26, 1972, affirming the United States District Court for the District of Kansas decision wherein the Petitioner was convicted of violating 15 U.S.C. 77(q), 18 U.S.C. 2 and 18 U.S.C. 1343 by using a scheme and artifice to defraud utilizing interstate communications in the offer and sale of a security.

OPINIONS BELOW

The judgment of conviction and sentence of the United States District Court for the District of Kansas is not officially reported. (Appendix A, Infra.)

The opinion of the United States Court of Appeals for the Tenth Circuit filed on June 26, 1972 (Appendix B, Infra) has not yet been officially reported.

DATE OF JUDGMENT AND TIME OF ENTRY

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 26, 1972.

Petition for Rehearing was denied by the United States Court of Appeals for the Tenth Circuit on August 7, 1972.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there is sufficient relevant and material evidence to sustain the conviction of Petitioner on Counts 5 and 8.

2. Whether the following actions of the trial court deprived Petitioner of a fair trial and due process of law:

(a) Permitting the Government in the first 2 1/2 weeks of trial to only introduce evidence of unrelated transactions prior to introducing any evidence relating to the transaction that was the subject matter of this case;

(b) Prohibiting arguments on relevancy and materiality by the Petitioner, and reserving until the conclusion of the presentation of the Government's case (exceeding six weeks of trial) its ruling on the admissibility of the testimony of witnesses and a mass of documentary evidence consisting of approximately 1,000 exhibits, which were introduced by some 94 witnesses

and all in the presence of the jury;

(c) Allowing masses of improperly and/or unidentified exhibits and irrelevant and/or immaterial evidence to be introduced and considered by the jury;

(d) Repeatedly assuring Petitioner, and the other defendants, in the case at bar that all remaining defendants of the indictment alleged not to be involved in Counts 5, 6, 8, 9, 10 and 11 would be tried in separate trials (including the defendants on trial in this action named in other Counts of the Indictment), and that the Court would accept no pleas unless all defendants were treated identically. At the end of this trial, the Court, in direct violation to this assurance, dismissed or accepted pleas of lessor offenses from these other defendants named in the Indictment, which were to be tried in subsequent trials.

3. Whether the trial court committed error in ruling and instructing that the commitment letter was a security as a matter of law, and disregarding the disparity in the dates between the date of the letter alleged in Count 5 (Dec. 2, 1965) and the date of the letter introduced by the Government (Nov. 29, 1965).

4. Whether the trial court committed error by failing to sustain Petitioner's motion for a separate trial.

5. Whether the trial court committed error in its refusal to rule and/or sustain Petitioner's motion for judgment of acquittal under Rule 29(a) made immediately after the Government rested, and in refusing to make a ruling until after the trial.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

15 U.S.C. 77(b)(1)
15 U.S.C. 77(q)
18 U.S.C. 2
18 U.S.C. 1343
5th Amendment to the United States Constitution
6th Amendment to the United States Constitution
8th Amendment to the United States Constitution

See Appendix D, infra.

CONCISE STATEMENT OF THE CASE

Petitioner, Wendell Warren Austin, along with 15 other defendants, was charged in a 50 Count Indictment with alleged violations of 15 U.S.C. 77(q), 18 U.S.C. 1341, 18 U.S.C. 1343, 18 U.S.C. 2314(1) and (2) and 18 U.S.C. 2. This was filed on May 9, 1968 in the United States District Court for the District of Kansas (R. 6736).

The Indictment charged that the Petitioner and the other defendants used various schemes and artifices, utilizing interstate communications, in the offering and selling of securities. No one defendant was named in all of the Counts, nor were there any allegations of a conspiracy amongst the defendants. The alleged securities involved were generally referred to as "letters of commitment."

Petitioner subsequently filed for a bill of particulars, motion for severence, motion to dismiss and motion for discovery and inspection (R. Vol. XXIII, 6809, 6828, 6834, 6838). These motions were overruled in whole or in part on January 6, 1970 (R. 32-91; 6905). The Court thereafter severed the Counts as to transactions, and ordered that the defendants involved in those transactions be tried in a series of separate trials. It further ordered that Counts 5 through 11, with the exception of Count 7, which was dismissed by the Court, would be considered as one transaction and the basis for the first trial (R. 6905). It involved seven of the defendants, including the Petitioner.

On March 17, 1970, the Government filed a document entitled "Order of Proof, Trial Brief and Proposed Stipulation." (R. 6857.) This document indicated that the Government intended to introduce evidence relating to 21 transactions alleged to be similar offenses at the first trial involving Counts 5, 6, 8, 9, 10 and 11 for the purpose of showing common scheme and design. It further indicated that Petitioner was allegedly involved in only six of the 21 transactions, and of the 83 listed witnesses that were to testify relating to these transactions, only 14 would testify as to the transactions involving Petitioner. This document also revealed that the Government would introduce 37 or more witnesses to testify about unrelated transactions prior to introducing any evidence relating to the Counts involved in this case.

On June 8, 1970, further proceedings were held for the defendants involved in this case. At this hearing, Petitioner, and the other defendants, raised objections in regard to the Government's proposed "Order of Proof" (R. 204-206). At this hearing, Petitioner renewed his motion for severence from the other defendants on the grounds that it would be impossible for a defendant to receive a fair trial considering the inevitable prejudice to Petitioner if all of the defendants involved in this case would be tried in a joint trial conducted in the manner proposed by the Government. Petitioner's, as well as the other defendant's, motions were overruled (R. 221-234).

At this same hearing the Court refused to enter pleas of nolo contendere for defendants Charles Michael Krauthamer and Darel Dean Martin. Thereafter the defendant Krauthamer attemped to plead guilty to one Count of the Indictment on the basis of a plea bargaining arrangement with the Government in which the offer was made that if the Court would accept this plea of guilty on the one Count, the Government would dismiss all other Counts of the Indictment against that defendant. Defendant Martin also agreed to enter a plea of nolo contendere on the same basis. The Court refused to accept these pleas of nolo contendere, and also refused to accept a plea of guilty from defendant Krauthamer as to Count 1. (R. 207-209; 235-240.) At this same hearing, another defendant sought to waive trial by jury, which was denied. The Court's rationale indicated that grounds for these refusals was to the effect that what happened to one of the defendants would happen to all of the defendants. The Court further refused to require the Government to dismiss all other Counts of the Indictment which were not going to be tried in this first trial on the grounds that they would be in a better position to defend themselves in this case if they were not faced with subsequent trials on the other Counts set forth in the Indictment. This, too, was refused by the Court. The Court concluded that all the defendants involved in Counts 5, 6, 8, 9, 10 and 11 would go to trial on July 21, 1970, and it would accept no pleas or dismissals as to any of the defendants and that all of the

defendants were going to be treated in the same manner. The only qualification to this position of the Court was that it was not certain as to whether it could refuse to permit the Government to dismiss against a defendant (R. 185-286).

On July 10, 1970, the Government filed a motion and order dismissing Counts 5, 6, 8, 9, 10 and 11 of the Indictment against defendants Krauthamer and Prewitt. These defendants, respectively, consented to this partial dismissal on July 14, 1970, and July 20, 1970. Petitioner did not receive notice of this motion and order until the day of the commencement of the trial, July 21, 1970. The other defendants also did not receive notice of this motion and order (R. 6918-6924). On July 21, 1970, trial was commenced against Petitioner and the other defendants (Bales, Beeman, Martin, and Savidge) on Counts 5, 6, 8, 9, 10 and 11 of the Indictment wherein the defendants were charged with violations of 15 U.S.C. 77(q), 18 U.S.C. 1341, 18 U.S.C. 1343, 18 U.S.C. 2314(2), and 18 U.S.C. 2. In substance, these Counts charged that the defendants used a scheme and artifice to defraud Gus Horwitz and utilized interstate means of communications in the offer and sale of a security, which was declared to be in the form of a letter of commitment dated December 2, 1965. Prior to the introduction of evidence by the prosecution, the Court ruled an objection of any one defendant would be considered an objection of each of the other defendants (R. 460).

At this same time, defendants moved "in limine" for an order of the Court ruling that as a matter of law the letter of commitment described in Count 5 of the Indictment (subsequently marked and introduced into evidence as Government's Exhibit 624 and 625) was not a security and prohibiting the Government from introducing the letter of commitment and other similar documents into evidence. The Court overruled this motion and stated that this was really a question of fact for the jury to determine based upon how the parties treated it (R. 454-460).

Petitioner and the other defendants again entered an objection to the manner in which the Government intended to present its evidence. It was requested that the Government present its evidence on the Counts involved in the case at bar (Counts 5, 6, 8, 9, 10 and 11) prior to introducing evidence on the other other transactions, which allegedly were going to be introduced for the purpose of showing common scheme, plan and design. Grounds for this objection were that it would be impossible for the Court, as well as the defendants, to determine questions or objections of relevancy and materiality unless a proper foundation was first laid by the Government for such evidence. Therefore, the defendants urged the Court to require that the Government in its presentation of its evidence first introduce evidence relating to the subject matter of the trial as a foundation for evidence relating to other transactions. The Court refused this motion (R. 454-460).

With little or no restrictions as to laying a proper foundation, relevancy and materiality, the Government spent the first 2 1/2 weeks of trial introducing evidence of unrelated transactions prior to introducing any evidence relating to the subject matter of this trial (Counts 5, 6, 8, 9, 10 and 11), hereinafter referred to as the "Horwitz transaction."

The Government's first witness to testify in reference to the Horwitz transaction was Francis Frank McCall. He was called to the stand on August 6, 1970. He testified that he and Gus Horwitz obtained an option to purchase a real estate venture called the Fox Valley Country and Golf Club located in Aurora, Illinois, for the sum of $750,000, after becoming acquainted with the Lincoln Mortgage Company of Wichita, Kansas, through a Chicago acquanitance (R. 2856). Thereafter he made an initial contact with Lincoln Mortgage Company for the purpose of obtaining a commitment letter for permanent financing of this project. After a meeting with defendant Bales of Lincoln Mortgage Company, Mr. McCall received a letter of commitment from Lincoln Mortgage Company dated November 29, 1965, addressed to Gus Horwitz. This witness identified two copies of this letter. There were no original copies introduced. (Ex. 624 and 625, R. 2818-2821) This was later to be declared as a security as a matter of law by the Court.

According to the testimony of Mr. McCall, he and Mr. Horwitz made three trips to the offices of Lincoln Mortgage Company in Wichita, Kansas. On the first trip, he

and Mr. Horwitz met with defendant Bales on November 27 or 28, 1965. They again traveled to Wichita on December 2 or 3, 1965, and met with defendants Bales and Savidge (R. 2841, 3165).

As a result of the second trip, they received a letter from Savidge and Associates, dated December 1, 1965, in which it was agreed that Savidge and Associates would obtain interim financing for them on performance of certain conditions precedent (R. 2837-2839). This letter was introduced by the Government (Ex. 627, R. 2833, 3167, 4291).

After Horwitz and McCall returned to Aurora, Illinois, from the second trip, they received a copy of the letter from Lincoln Mortgage Company, Inc., addressed to Savidge and Associates, Inc. The letter was dated December 3, 1965, and made reference to a conference of the previous day with Horwitz and McCall, and advised defendant Savidge that Lincoln Mortgage Company had executed its commitment and requested funding by defendant Savidge's firm. The letter made a reference to the balance of the commitment fee that was due and stated that Lincoln Mortgage Company's commitment would only be in full effect upon payment of that fee. (Ex. 628, R. 2844-2845.)

The third trip to Wichita, Kansas, was on December 21, or 22, 1965. At that time McCall, Horwitz and Sneider (attorney for Mr. McCall) were advised by Lincoln Mortgage Company that they were not going to fund in accordance with their commitment letter and that the Investment Corporation

of America, Inc., would be substituted for Lincoln Mortgage Company. The release of Lincoln Mortgage Company was executed by McCall on behalf of Gus Horwitz and James R. Scneider. (Ex. 634, R. 2858, 2861.)

McCall later received an acknowledgment letter from the Investment Corporation of America, signed by Edwin Prewitt, accepting the substitution. This letter further acknowledged that the commitment fee of $14,500, which was originally paid to Lincoln Mortgage Company, had been transferred to the Investment Corporation of America (Ex. 632, R. 2865).

Prewitt later sent the balance sheet of Investment Corporation of America, as of September 30, 1965, approximately one week after he had received the said letter of acknowledgment (Ex. 637, R. 2870, 3918, 4290). McCall and Horwitz later received another balance sheet prepared by C. M. Krauthamer, a certified public accountant, that was dated January 10, 1966, from the Investment Corporation of America (Ex. 639, R. 2874, 4290).

The only evidence relating to Petitioner relative to the Horwitz transaction consisted of a telephone conversation McCall had with Petitioner in the latter part of February, 1966, or around the first of March, 1966. At that time, he had a telephone conversation with Prewitt of Investment Corporation of America. During that telephone conversation, Prewitt introduced Petitioner to McCall. At that time, Petitioner offered to act as a broker in placing a certificate of deposit or a compensating balance on deposit in a suitable banking or

savings and loan institution in $10,000 increments. McCall was to find such an institution to accept this type of deposit. In the event this offer was to be accepted, McCall was to wire the Stockyards National Bank of Wichita, Kansas. This offer by the Petitioner was integrated into a telegram sent to McCall on March 3, 1966 (Ex. 645, R. 2889, 4240, 4290).

McCall and Horwitz thereafter contacted the Home Building and Loan Association of Aurora, Illinois, to determine if they would accept a compensating balance deposit. They indicated that they were not accepting such deposits at that particular time. They thereupon dropped the matter and did nothing further relative to this offer to place a compensating balance deposit in a suitable lending institution (R. 2889-2861; 2924-2926).

McCall wholly understood the nature and the legal effect of a compensating balance deposit. He testified that he understood that it was not a drawable account and that its only purpose would be to increase the lending power of the savings and loan institution. His testimony revealed that he was a sophisticated businessman in this area by explaining lending power of a savings and loan institution is determined by cash reserves and the laws and regulations relating to such an institution. He had no reason to believe that this offer by Petitioner was anything but a legitimate transaction. (R. 2924-2926.)

The Government offered no evidence, through McCall or any other witnesses, that this offer to place a compensating balance

was part of the alleged scheme and artifice to defraud Gus Horwitz. There was no promise by Petitioner to ever fund this $750,000 loan, nor was there any evidence to indicate that he was a part of the alleged scheme and artifice in any manner whatsoever.

The alleged victim, Gus Horwitz, verified everything that McCall stated. Both Horwitz and McCall indicated that this transaction had come to an end and that this effort to place a compensating balance deposit in a local lending institution was merely a last ditch effort. They both indicated that this was not the "11th hour," but the "12th hour." (R. 3213.)

The Government provided no evidence that Petitioner could not have provided the funds for the compensating balance deposit had such offer been accepted. During the first part of the trial, the Government introduced H. Cornell Smith. He was identified as a former president of the East Side National Bank located in Wichita, Kansas. He testified under cross examination that Petitioner placed approximately $1,200,000 in compensating balance deposits in the East Side National Bank. Therefore, there was evidence that Petitioner had the capabilities of placing a compensating balance deposit in a suitable lending institution in Aurora had this offer been accepted (R. 524).

The other two key witnesses of the prosecution were two former co-defendants, to wit: Charles M. Krauthamer and Edwin Prewitt.

The first of these two witnesses to

testify was Krauthamer. He identified himself as a certified public accountant. He testified that he prepared the balance sheet of Investment Corporation of America, dated September 30, 1965 (Ex. 637, R. 2870, 3918, 4290), and prepared a certified year-end audit for Investment Corporation of America reflected in a balance sheet dated January 10, 1966 (Ex. 639, R. 2874, 4290).

Krauthamer testifed that Petitioner did not participate indirectly or directly in the audit or the preparation of the two balance sheets. He testified that all of the information that went into both of the balance sheets was furnished by Prewitt. He indicated that he did not know the Petitioner at that time. It was two years later when he first met the Petitioner (R. 4013-4014).

Prewitt was characterized as a tie-in witness and the key witness for the Government. His testimony covers approximately 600 pages of transcript. Therefore, his testimony takes on an additional significance to Petitioner.

Throughout his testimony on the Horwitz transaction, Prewitt stated that Petitioner had nothing whatsoever to do with the preparation or the transmittal of the letter of commitment or in any way participated in the Horwitz transaction. This was established in his direct testimony.

He testified that he spoke with Petitioner in March, 1966, in Dallas, Texas. Prewitt stated that he told Petitioner he was having difficulty funding a loan in Aurora, Illinois, and asked if Petitioner would be able to place a compensating balance deposit

in one of the local lending institutions in that city. Petitioner indicated that he could place such a deposit in a qualified institution subject to certain terms and conditions. Petitioner spoke with McCall and sent a telegram confirming this offer to place a compensating balance deosit in a suitable lending institution in Aurora. This telegram was sent on March 3, 1966 (Ex. 645, R. 2890).

Prewitt testified he later learned that the lending institution in Aurora, Illinois was unable to accept this offer to place a compensating balance deposit for some reason. This, according to Prewitt, was the only act performed by Petitioner relative to the Horwitz transaction. (R. 4535, 4539.)

Count 5, paragraph 2, of the Indictment alleges that Petitioner and the other defendants represented that Charles Allen Savidge, Lincoln Mortgage Company and Investment Corporation of America would obtain a loan for $750,000 for Gus Horwitz. The Government did not introduce any evidence showing that Petitioner made any representation to this effect.

Count 5, paragraph 4, of the Indictment alleged that it was part of the said scheme and artifice to provide Gus Horwitz with a communication purporting to show Irving Wellesley Beeman held an insuring credit of the Investment Corporation of America in escrow, when in fact this was known to all the defendants to be false. There was no evidence whatsoever that Petitioner had anything to do with this communication. The Government even failed to establish by any

evidence that there was anything illegal or fraudulent about this communication. The truth or falsity of this communication was never dealt with by the Government. There was no evidence showing that defendant Beeman did not so hold an insuring credit in escrow for the Investment Corporation of America. The Government even failed to introduce a copy of this escrow contract, or any evidence showing what the escrow contract contained, or any of the terms and conditions thereof.

At the conclusion of the Government's evidence, the trial court proceeded to hear counsel upon the question of materiality and relevancy of the evidence. The exhibits were number through 909, and had been introduced through some 94 witnesses. Some exhibits included as many as 40 to 50 subdocuments or subexhibits under one number.

Since the Court had reserved arguments and ruling as to the materiality and relevancy of these exhibits, counsel was permitted to proceed to argue those questions (R. 5038). Due to the confusion that had arisen in the minds of all the counsel involved in this trial, as well as the Court, as to just what the nature of the testimony was pertaining to many of the exhibits, the argument and the discussion became extensive (R. 5038-5283). This unmanagability was caused solely by the trial court's refusal to conduct this trial in a traditional manner and in accordance with the rules of evidence. Most of this mass of documents were admitted without regard to probative value, materiality or

relevancy. The trial court realizing that it had created a procedural monster and an impossible situation from which it could not extricate itself, admitted almost all of the exhibits.

At this stage, the Court stated, "I will admit the documents for what they are worth in connection with the relevancy and materiality issue except those that have been withdrawn or I have denied. There are not many of them." (R. 5283.)

The Court stated during the arguments on relevancy and materiality that it would consult the record in regard to specific testimony on certain exhibits. The record was never reviewed prior to making the rulings (R. 5055).

Thereafter Petitioner moved for judgment of acquittal under Rule 29(a). The Court refused to rule at this time and reserved its rulings (R. 5285).

Except for defendant Darel Martin, all of the other defendants rested after presenting their motions for judgment of acquittal under Rule 29(a).

Regarding the Court's rulings on questions of relevancy and materiality of the exhibits, the Court stated, "The Court, as I indicated to you, would rule with respect to certain exhibits. I have so ruled. We have been having hearings on them. The fact that I have considered them or permitted them to be presented to you on the basis of relevancy does not take away from you the obligation or the duty to determine their effect and how you wish to interpret them in connection with the credibility as far as you are concerned. It just

means that as a matter of law I have determined they are identifiable for the purpose of your consideration." (R. 5413.)

The Court does not say anything further about these exhibits, which the jury has heard discussed for approximately six weeks of trial. The Court does not admonish the jury regarding the evidence that was denied introduction or discuss the certain exhibits that were denied admission or were withdrawn.

With the exception of defendant Martin, all of the defendants rested. Defendant, through his counsel, commenced an opening statement (R. 5413-5414). During the course of the testimony of defendant Martin, it was learned that he had been convicted of fraud and was presently serving in a federal penitentiary in Fort Leavenworth, Kansas.

After defendant Martin rested, the defendants again moved for judgment of acquittal. This time it was under Rule 29(b). The Court again took these motions under advisement and reserved ruling on them (R. 5628-5631). After final arguments by Petitioner Austin and the other defendants, the Court instructed the jury for approximately 3 1/2 hours (R. 5879-5949).

The trial court instructed the jury that the letter of commitment dated on or about December 2, 1965, signed by Darel D. Martin for the Lincoln Mortgage Company was a security within the meaning of the following definition, "...means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participating in any profit-

sharing agreement, investment contract, or in general, any interest or instrument commonly known as a 'security.'" (R. 5915.)

After the instructions, defense counsel met in chambers with the Court. Counsel objected to the instruction that the letter of commitment was a security as a matter of law. The trial court then stated, "I decided it was necessary that I do so because actually if it is not a security within the meaning of the law the Count should be dismissed and this way you have got a clear cut issue on it. If I had done it the other way we would be leaving to the jury determination of a legal problem." (R. 5951.)

Counsel also objected to the instruction where the Court stated that a commitment dated "on or about" December 2, 1965 would be sufficient in spite of the fact that the Indictment charged specifically the commitment involved was dated December 2, 1965 and did not allege an alternative or "on or about" in the Indictment. The Court overruled this objection (R. 5956-5958).

On September 3, 1970, the jury found Petitioner Austin guilty of Counts 5 and 8, and not guilty of Counts 6, 9, 10 and 11.

On December 4, 1970, the Court ordered that the motions of Petitioner for acquittal, arrest of judgment, new trial and dismissal be overruled. Petitioner Austin was sentenced on January 13, 1971, to serve five years in the federal penitentiary.

As for the remaining defendants that were to be tried in subsequent trials, most of them were allowed to plead guilty to

misdemeaner charges with their sentences suspended. All of these defendants had their sentences suspended and placed on probation.

ARGUMENT

1. WHETHER THERE IS SUFFICIENT RELEVANT AND MATERIAL EVIDENCE TO SUSTAIN THE CONVICTION OF PETITIONER ON COUNTS 5 AND 8.

In the trial of this case the Government relied solely upon circumstantial evidence in its effort to establish a prima facie case against Petitioner. Therefore, the Court's determination as to the sufficiency of the evidence must be based upon the test that such circumstantial evidence excludes every hypotheses except that of guilt. Cartwright v. U.S., C.A. 10th, 1964, 335 F.2d 919.

The significant difference between circumstantial and direct evidence is that with the former the fact to be established must be inferred from the fact that is offered, while the latter goes directly to the fact to be established. Therefore, the admissibility of circumstantial evidence is a problem of relevancy, and the proper test is that the evidence is admissible if it makes the fact to be established more probable than it would be without the evidence. Radomsky v. U.S., C.A. 9th, 1950, 180 F.2d 781, 783; Mutual Life Ins. Co. of N.Y. v. Hillmon, 1892, 12 S.Ct. 909, 913, 145 U.S. 285.

Analyzing the sufficiency of evidence to support the conviction of Petitioner on

Counts 5 and 8, there appears to be absolutely no evidence upon which a hypothesis could be developed from any of the circumstantial evidence that Petitioner was involved in the alleged scheme or artifice to defraud Gus Horwitz. Direct testimony of four of the Government's key witnesses (Horwitz, McCall, Prewitt and Karuthamer) exonerated Petitioner of any guilt or participation in this transaction. The following analysis of the evidence presented by the Government for each of the allegations charged in Counts 5 and 8 of the Indictment supports this conclusion:

(a) A representation that Charles Allen Savidge, Lincoln Mortgage Company, Investment Corporation of America would obtain a loan of $750,000 for Gus Horwitz is alleged in Count 5, paragraph 2. The Government presented no evidence indicating that Petitioner made any representation that the above mentioned would obtain a loan of $750,000 for Horwitz. The Government's key witness, Edwin Prewitt, testified that the only contact Petitioner had with this transaction was when he asked Petitioner if he could place a compensating balance deposit in a lending institution in Aurora, Illinois. Petitioner stated that he could under certain terms and conditions. This, according to Prewitt, was the only act performed by Petitioner relative to this transaction. Prewitt testified as follows:

"Q Now had you ever spoken to Mr. Austin prior to that time relative to this loan commitment for the Fox Valley Country Club in Batavia, Illinois?

"A No sir.

"Q And to the best of your knowledge Mr. Austin had not participated in any respect prior to that time with the Fox Valley Country Club matter?

"A If he had anything to do with it I don't know." (R. 4535.)

To further substantiate Petitioner's noninvolvement in this Horwitz transaction, the following evidence was elicited from McCall after Petitioner offered to place a compensating balance deposit in a suitable lending institution in Aurora, Illinois:

"Q Now, sir, as you previously testified this all took place in the latter part of February or the very first part of March, 1966. Now, had you at any time prior to that time, spoke on the telephone with anyone purporting to be Mr. Austin?

"A No.

"Q And did you ever see Mr. Austin?

"A No.

"Q Did you ever have any dealings with Mr. Austin directly or indirectly prior to this time to your knowledge?

"A No, not to my knowledge." (R. 2927)

Continuing with the same line of questioning:

"Q Now, all of your dealings prior to that time had been with other individuals, isn't that correct?

"A That is correct." (R. 2928)

The alleged victim, Gus Horwitz, substantiated McCall's testimony of Petitioner's noninvolvement in this loan transaction. He testified as follows:

"Q Mr. Horwitz, I refer you to

Government Exhibit No. 645, which is a telegram that you identified, from Wichita, Kansas, relative to a certificate of deposit to be deposited in the Home Building and Loan Association.

"A Yes sir.

"Q Purportedly sent by Wendell Austin. Now, you have never met Mr. Austin in your entire life?

"A No sir.

"Q And before this telegram you had never even heard his name?

"A I personally had never heard his name. Mr. McCall may have had contact or phone conversation with him, I don't know." (R. 3213.)

The Government failed to present any evidence that Petitioner made any such representation, or aided and abetted in making such representation. This direct evidence would prevail over any inference that might be drawn from circumstantial evidence. The Government has not even presented any circumstantial evidence from which a reasonable inference could be drawn to indicate that Petitioner participated in this alleged representation.

(b) That defendant Austin in furtherance of the scheme provided to Gus Horwitz a copy of the financial statement of Investment Corporation of America which contained false and misleading information regarding the valuation of the assets of Investment Corporation of America as alleged in Count 5, paragraph 3.

The Government's witness, Edwin Prewitt, stated on direct examination that he was the president and majority stockholder

of Investment Corporation of America, and that Petitioner was not involved in furnishing any information contained in that financial statement nor participated in the preparation thereof. Prewitt testified as follows:

"Q Well, in any event Mr. Austin did not participate in those activities in the preparation of that financial statement?

"A Not to my knowledge at all.

"Q Or any of the financial statements, since there are several of ICA; is that correct?

"A I would say no, as far as Austin is concerned." (R. 4539.)

To further establish that Petitioner did not participate in any manner in the preparation of the financial statements of Investment Corporation of America, the following testimony was given by Charles Krauthamer, who identified himself as a certified public accountant who prepared the statements:

"Q Now Mr. Prewitt furnished you all the information relative to your first audit of Investment Corporation of America, isn't that correct?

"A Most of it, sir, yes sir.

"Q And he had a secretary that was more or less the messenger or hand carried these articles to you?

"A No sir.

"Q Well, was it just Mr. Prewitt that brought these things to your motel room at that time?

"A Yes sir, it was --" (R.4013.)

Continuing with this same line of questioning:

"Q Mr. Austin in no way participated in this audit at all or its preparation?

"A That is correct.

"Q As a matter of fact you didn't even know him at that time?

"A No sir.

"Q And you didn't even know -- it was 2 years later when you met Mr. Austin, in 1967?

"A Correct.

"Q And then this second audit of January 10, 1966, Mr. Prewitt again furnished you everything contained in that audit, did he not?

"A A great deal of it, yes sir.

"Q Did Mr. Austin have anything to do with that audit?

"A No sir.

"Q Or with the preparation of that balance sheet?

"A No sir." (R. 4014.)

The Government presented no evidence to refute this direct testimony of its own witnesses, or to establish that Petitioner aided and abetted. There was no evidence to indicate that Petitioner used or provided this statement to Gus Horwitz, or knew that it contained false and misleading information.

(c) That defendant Austin as a part of the alleged scheme provided to Gus Horwitz a communication purporting to show that Irving Wellesley Beeman held an insuring credit of Investment Corporation of America in escrow, whereas in truth the defendant knew that it contained misleading and false information, as alleged in

Count 5, paragraph 4.

Again there was no evidence presented by the Government whatsoever to indicate that Petitioner had anything to do with this communication. The Government failed to even show that there was anything illegal or fraudulent about this communication. The truth or falsity of this communication was never dealt with by the Government. Furthermore, there was absolutely no evidence indicating that defendant Beeman did not so hold an insuring credit in escrow for Investment Corporation of America.

The Government also failed to present evidence as to the substance of this escrow contract. There was no evidence to indicate the terms and conditions of this escrow contract. There was no evidence showing that Petitioner was engaged in anything illegal relative to that communication, or that it was a part of the so-called scheme and artifice to defraud Gus Horwitz. There was no evidence of aiding and abetting.

The Government even failed to establish evidence that there was any reliance by the alleged victim, Gus Horwitz, on this communication.

(d) That defendant Austin on or about November 29, 1965, did offer and sell securities by use of means of interstate commerce send a letter of commitment, dated December 2, 1965, for which $15,000 was paid in advance fees, and a financial statement of Investment Corporation of America containing false and misleading information as to the valuation of

of the assets contained therein as alleged in Count 5, paragraph 5.

As previously stated herein, the Government's own witnesses (Horwitz, McCall and Prewitt) stated that Petitioner was not involved in this loan transaction. There was no evidence presented that he had anything to do with the preparation or the sending of the letter of commitment or the financial statement of Investment Corporation, or aided and abetted in the preparation and sending.

(e) Causing to be transmitted in interstate commerce by means of a telegram on or about March 3, 1966, from Wichita, Kansas, to Aurora, Illinois, for the purpose of defrauding Gus Horwitz as alleged in Count 8.

As has been firmly established by the Government's own witnesses, this was the only contact (if it can be considered such) that Petitioner had with the Horwitz transaction. The telegram states as follows: "Have investor with $750,000 cash. Will deposit Home Building and Loan or equivalent institution in $10,000 increments. Request differential between 4 1/2 per cent interest paid by institution by bank wire to Stockyards National Bank account of Wendell Austin." (Ex. 645, R. 2890.)

The evidence clearly indicated that this was merely an offer to place a compensating balance deposit in the amount of $750,000 with Home Building and Loan Association or equivalent institution on the stated terms and conditions. This was to be confirmed on a bank to bank communication with the Stockyards National Bank in

Wichita, Kansas. This document speaks for itself in establishing that it was a mere offer to place a compensating balance deposit on certain terms and conditions.

Mr. McCall testified on direct examination that he received this telegram offering to place a compensating balance deposit after he had spoken to Prewitt and Austin in the latter part of February, 1966, or the first part of March, 1966. Mr. Prewitt stated that Petitioner could place a compensating balance deposit in a lending institution in Aurora, Illinois, on certain terms and conditions. If McCall could find such an institution to accept such a deposit it was indicated that this might assist McCall in obtaining a loan. The substance of this testimony is as follows:

"Q Now, specifically, how did you come to know the name of the person that you were talking to on the phone?

"A Through Mr. Prewitt.

"Q And what was then the conversation that you had with the person whom you believed to be Mr. Austin?

"A He said that he was in possession of these documents from Mr. Prewitt and that they would continue along the same lines, that he was stepping in at Mr. Prewitt's request, and that he had a depositor or some brokerage money that he would deposit for us, we assumed to be drawn upon. I said, 'Would you please send us out a telegram or some confirmation to this fact,' which he did.

"Q And is the Exhibit that you hold in your hand -- give the number of it again please?

"A Yes, this is Exhibit 645.

"Q Did you then receive that following your conversation with the person you believed to be Mr. Austin?

"A Yes, I received this. This is addressed to Frank McCall, at 1598 Farnsworth Avenue, Aurora, Illinois. It states: 'Have investor with $750,000 cash. Will deposit to Home Building & Loan or equivalent institution in $10,000 increments. Request differential between 4 and one-half percent interest paid by institution by bank wire to Stockyards National Bank account of Wendell Austin.

"'Wendell Austin.' Down below it has $750,000, $10,000 and ' 4 and one-half'.

"Q Now, sir, upon receipt of that telegram or did you in fact receive the telegram?

"A Yes we did.

"Q Did you receive it about the day that it appeared to be stamped?

"A Yes.

"Q Upon your receipt of that telegram what, if anything, did you do regarding the content thereof?

"A We contacted the Home Federal Building and Loan in Aurora, discussed this with them. They didn't accept compensating deposits at this particular time. It was their understanding that --" (R. 2890.)

At that point the Government prosecutor interrupted Mr. McCall and went into other matters unrelated to Petitioner. Under cross examination, McCall continued with his testimony about the telegram as follows:

"Q And at that time Mr. Austin stated to you that he could place in a bank in Aurora, Illinois, a certificate of deposit in the sum of $750,000?

"A At that particular time he told me that he would seek these particular funds but then at a later date he sent me the telegram stating that this was a fact.

"Q And you requested this confirming telegram from Mr. Austin?

"A That is correct.

"Q And did you so receive that telegram? I am holding here, Mr. McCall, Exhibit 645. It is my copy but it is the same as yours. This one right here (indicating).

"A Yes, that is the telegram I received.

"Q Now, on this telegram it states, in effect, -- well, it says, 'Have investor with $750,000 cash. Will deposit Home Building & Loan or equivalent institution in $10,000 increments.' Now, the Home Building and Loan Bank, I believe you testified, was a bank in --

"A (interrupting) Savings and Loan.

"Q Savings and Loan. But this was located in Aurora, Illinois.

"A That is correct.

"Q And it goes on, 'Request differential between 4 and one-half percent interest paid by institution by bank wire to Stockyards National Bank account of Wendell Austin.'

"Did your bank ever confirm this with the Stockyards National Bank in Wichita, Kansas?

"A No.

"Q And what was the reason why this money was never confirmed?

"A Because that is only a compensating balance. It is not drawable.

"Q Would you explain for the jury and the Court the definition or your understanding of what a compensating balance is?

"A Well, I am not an expert but I believe it is deposited to a savings and loan or a bank and it is not allowed to be drawn out and it has to be deposited there for a certain period of time. In other words, it can be put in in favor of the particular party but they can't drawn against it. And the difference, for paying for this, in other words, so you don't deplete the cash reserves of the institution. The institution may have a cash reserve that they can only lend so much as set up by the Federal Home Loan Bank, they have to have a reserve of so much money. Well, this institution cannot draw above and beyond its lending powers but by compensating and raising this up it gives them the privilege of making a loan which normally they wouldn't be able to make. In other words, they would be staying within the statutes set up by the Federal Home Loan Bank by having this amount of cash and giving it out but never depleting and going beyond the percentage.

"Q This was the intent, to build up the lending power of this bank in Aurora, so that in turn they could lend you the money; was that the original intent?

"A That was the intent.

"Q But through no fault of yours or Mr. Austin the Home Building and Loan

Savings Company did not accept this type of deposit?

"A No, they don't.

"Q And, sir, is there any reason for you to believe that this was not a legitimate transaction?

"A I couldn't speak for the Home Building and Loan. As to the validity of the transaction, or legality, as I say, I only have a fleeting knowledge of banking laws and whatever their thoughts on this particular type situation was, that they didn't want to handle it, and I didn't go into it any further.

"Q But that was the only reason, was because they did not want to handle this type of deposit?

"A That is correct, they just said 'no' and that was it." (R. 2924-2926.)

The Government offered no evidence, either through McCall or other witnesses, that this offer to place a compensating balance deposit was part of the so called scheme to defraud Gus Horwitz. The evidence clearly indicated that it was a legitimate offer to place a compensating balance with the lending institution. As stated by McCall the only thing he did relative to reliance on this telegram was to contact Home Building and Loan Company to determine if it would accept this compensating balance deposit. The bank officials apparently at that institution said they were not accepting compensating balance deposits at that particular time, and that was the end of it. It was through no fault of McCall or Petitioner, but was merely a policy of that particular lending

institution at that particular time.

To further substantiate the noninvolvement of Petitioner in this Horwitz transaction, Mr. McCall testified in substance that the transaction had come to an end. He testified as follows:

"Q And it was around this time (March 3, 1966), I think we could characterize it as being the 11th hour of this financial transaction relative to your purchase of the real estate in question, in other words, everything was falling apart.

"A I would say it was the 12th hour.

"Q Pardon me?

"A It was the 12th hour." (R.2928.)

The alleged victim, Gus Horwitz, also exonerated Petitioner as to any involvement in this loan transaction, testifying substantially the same as McCall that for some reason Home Building and Loan was not at that time accepting compensating balance deposits, that at this point the transaction had come to an end, and furthermore that he never met Petitioner and had never even heard his name prior to the sending of the telegram (R. 3213-3215).

As has been clearly indicated by the testimony of the Government's own witnesses, including the alleged victim himself, the allegation that this was a part of the scheme and artifice to defraud Gus Horwitz was refuted. There was no evidence to indicate that this was a false offer to place a compensating balance deposit, or that such deposit could not have been placed, or that it was not in every respect a

legitimate communication.

If the Government had any doubt as to its legitimacy, it surely could have ascertained one way or the other by merely contacting the Stockyards National Bank in Wichita, Kansas, which was the bank that was going to be used to consummate this transaction, or the banking institution in Aurora that did not accept this offer.

The Government asserted in its argument against Petitioner's motion for a judgment of acquittal that even though the offer to place a certificate of deposit was a lawful act, it was their conclusion that it was Petitioner's intent to "string McCall and Horwitz along a little more." (R. 5328.) There is absolutely no evidence to substantiate this contention. The Government's own witnesses, including the alleged victim himself, refuted this contention.

This is the only rebuttal that the Government presented. For some strange reason the Government declares that Petitioner's intent was wrong, but it fails to establish this by any evidence. Its own direct evidence refutes this ascertion. Since this direct evidence refutes any possible inference that could be created from circumstantial evidence, the direct evidence and the inference of innocence must be accepted.

The law presumes honesty and fair dealings. Bad faith or fraud is never presumed and must be established affirmatively. Boone v. Kerr-McGee Oil Industries, 217 F.2d 63, 65.

In Kirby v. U.S., 174 U.S. 47, 19 S.Ct. 574, the Court stated, "The presumption

of the innocence of an accused attends him throughout the trial and has relation to every fact that must be established in order to prove him guilty beyond a reasonable doubt."

There is no evidence that Petitioner engaged in any conduct to deceive Gus Horwitz. There was no evidence that Petitioner knew anything about the financial condition of any of the companies allegedly involved, or made any representation of the financial condition of any company to Gus Horwitz. There is no evidence that he participated in any respect or involved himself with any of the circumstances surrounding the Horwitz transaction. In substance, the Government failed to provide any evidence as to the guilt of Petitioner.

It should be further noted that Count 8 is a part of Count 5 of the Indictment. Count 8 should have been dismissed and made a part of Count 5 in order to avoid mutliplicity.

The test in determining whether there is multiplicity is whether the offenses each require proof of an additional fact that the other does not. Blockburger v. U.S., 1932, 284 U.S. 299, 304, 52 S.Ct. 180.

In U.S. v. Greenberg, 1962, 30 F.R.D. 164, the Court stated that the essence of 15 U.S.C. 77(q) is a scheme to defraud and incidental transmissions in interstate commerce do not constitute separate crimes. See also U.S. v. Hughes, 195 F.Supp. 797, et seq.

It is apparent that the Government in this case is alleging a separate crime for

each transmission under the Securities Act. It should not be permitted to allege separate counts by merely changing the statutes cited of the same offense.

2. WHETHER THE ACTIONS OF THE TRIAL COURT AS SET FORTH IN PARAGRAPHS 2(a) THROUGH (d) OF THE SECTION ENTITLED "QUESTIONS PRESENTED" HEREIN DEPRIVED PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF THE LAW.

On March 17, 1970, the United States Attorney filed a document entitled "Order of Proof, Trial Brief and Proposed Stipulation." (R. 6857.) This document further indicated that Petitioner was allegedly involved in only 6 of these 21 transactions, and of the 83 listed witnesses that were to testify, only 14 would testify as to the transactions involving Petitioner.

Petitioner renewed his motion for severance on June 8, 1970, on the grounds it would be impossible for him to receive a fair trial and due process of law in view of these numerous unrelated transactions and witnesses intended to be introduced by the Government, and the prejudicial manner in which the Government proposed to proceed. Objections were also raised in reference to the Government's proposed "Order of Proof." (R. 204-206.) The objections and motions were overruled (R. 221-234).

On the day the trial commenced, July 21,

1970, but prior to the introduction of evidence by the Government, Petitioner and the other defendants again entered an objection as to the manner in which the Government intended to present its evidence. Petitioner requested that the Government present its evidence on the Counts involved in the case at bar (Counts 5, 6, 8, 9, 10 and 11) prior to introducing evidence on other transactions, which were allegedly being introduced for the purpose of showing common scheme and design. The grounds for this objection were that it would be impossible for the Court to determine questions or objections of relevancy and materiality as such evidence was being presented unless it first had evidence of the subject matter of this trial. This request was refused (R. 454-460).

For the first 2 1/2 weeks of trial the Government dealt exclusively with evidence relating to transactions unrelated to the subject matter of this trial. Hearsay evidence under the guise of business records were marked as exhibits and the witnesses were freely allowed to testify on those documents. Petitioner and the other defendants continually objected to this procedure throughout the trial.

During this first 2 1/2 weeks of the trial, the Government dealt exclusively with other transactions not involving the subject matter of this trial. It introduced approximately 600 exhibits into evidence that were unrelated to the Horwitz transaction. The testimony and the exhibits were introduced into evidence without a proper foundation being first laid by

37

the Government, and without regard to relevancy, materiality and probative value. They were introduced over the objections of all of the defendants.

By the time the Government got to the Horwitz transaction, the jury had heard the testimony on numerous other unrelated transactions, hearsay evidence and evidence having little or no probative value or relevancy.

Statements and acts of other defendants before or after a particular defendant's involvement is clearly inadmissible against that defendant. Lane, et al. v. United States, 8th Circuit, 1929, 34 F.2d 413. Brown v. United States, 1893, 150 U.S. 93, 98, 14 S.Ct. 37, 39.

The trial judge is charged with the responsibility to see that defendants are insured a fair trial. The Court's failure to observe fundamental fairness in conducting the procedure of the trial is so fundamental to the concept of justice that it is a denial of due process. Kuykendall v. Hunter, 10th Circuit, 1951, 187 F.2d 545, 546.

In the case at bar, the trial judge was adequately apprised of the complexity of the evidence and the manner in which the Government intended to introduce the evidence. The Government's "Order of Proof" clearly indicated that the Government was going to introduce a mass of documents and numerous witnesses prior to introducing any evidence on the case at bar. It was quite apparent that there would be no foundation for the evidence relating to these other transactions, which were being introduced

to show common scheme and design, until the Government had introduced sufficient foundational evidence of the Horwitz transaction.

On August 11, 1970, prior to the testimony of the alleged victim, Gus Horwitz, the Petitioner and the other defendants again objected to the haphazard manner in presenting the prosecution's case. The defendants specifically objected to the evidence being offered that was unquestionably irrelevant and immaterial, and even if the evidence was technically relevant and material, the probative value was far ourweighed by the possible prejudice to the defendants. Rather than reply to this objection, the Court stated, "...at least up to now. I can't tell what the evidence is..." (R. 3158.)

Therefore, it is quite conceivable that the jury did not understand what was transpiring, or for that matter know what the case was all about until several weeks had transpired. At that time they had heard so much prejudicial testimony of the witnesses relating to other transactions that no amount of instructions would ever erase the prejudice.

In Beckwith v. U.S., 10th Circuit, 1966, 367 F.2d 458, the trial involved the prosecution for fraudulent offering and sale of stock by the use of mail, the Court stated, "Testimony as to the acts or words of another on a date prior to the time when the defendants are shown to be in the scheme should not be admitted, or if already admitted should be disregarded by the jury." Accordingly, the Court is given some

latitude to correct a situation where evidence is submitted that should not have been by an instruction to the jury to disregard it. However, there must be some degree of limitation. In the case at bar, there are masses of documentary evidence and weeks of testimony involving matters that are completely unrelated to the subject matter of the trial. Much of this evidence was totally immaterial and irrelevant.

Many of these documents were not even properly identified or marked as exhibits. In spite of vigorous arguments by defendants as to the relevancy and materiality throughout the trial, the Court allowed almost all of these exhibits into evidence at the close of the trial.

The Court stated in admitting these documents, "I will admit the documents for what they are worth in connection with the relevancy and materiality issue except those that have been withdrawn or I have denied. There are not many of them." (R. 5283.)

In a later Second Circuit case (U.S. v. Tomaiolo, 1958, 249 F.2d 683, 691) the Court stated: "By receiving this mass of inadmissible, irrelevant and highly prejudicial testimony, the District Court permitted the prosecution to paint the defendant Tomaiolo as a bad man, associating with criminal companions, who would do most anything. The accumulation of these errors made it impossible for the jury to limit its consideration to the charges for which Tomaiolo was being tried, and in some, they constitute reversible error."

In U.S. v. Smith, 6th Circuit, 1968, 403 F.2d 74, the Court considered the defendant's conviction for knowingly receiving and concealing a stolen automobile which had been transported in interstate commerce. The Court said that while it is usually within the discretion of the trial judge to decide whether an instruction is sufficient to cure the error or whether he must declare a mistrial, it might happen that the error of the jury's hearing inadmissible testimony might not be curable by instruction. The Court concluded that such prejudicial error existed in the case it was considering. It reversed the lower court.

Similarly, in Maestas v. U.S., 10th Circuit, 1965, 341 F.2d 493, and in Lawrence v. U.S., 10th Circuit, 1966, 357 F.2d 434, it was held that the convictions must be reversed since the jury heard the testimony and that it could not be cured by instruction. In the former, a witness referred to the prior imprisonment of the defendant who was on trial for unlawful sale of narcotics, and in the latter, the defendant was convicted of a bank robbery after the introduction of a statement by a co-defendant's attorney to the effect that the defendant had planned the robbery.

The United States Supreme Court also indicated the ineffectiveness of limiting instructions in certain circumstances. Bruton v. U.S., 1968, 391 U.S. 123, Marshall v. U.S., 1959, 360 U.S. 310.

The Court stated in Burch v. Reading Co., 140 F.Supp. 136, aff'd. 240 F.2d 574 (3rd Circuit), cert. denied, 1957, 353

U.S. 365, that: "It is improper to permit in evidence testimony which might tend to draw the minds of the jury from the important issues, especially where it may prejudice, confuse or mislead them into giving their attention to collateral matters." The Burch case, supra, may be an apt description of what happened in the case at bar. The jury's attention was unquestionably distracted from the actual issue in the Horwitz transaction by being inundated with a flood of evidence concerning other transactions.

As these cases indicated, there can be testimony that will so prejudice the jury as to require the overturning of a conviction. In the Lawrence case, supra, 357 F.2d 434, the testimony that a defendant had been in prison caused such a reversal. Surely, the introduction into evidence of highly prejudicial, immaterial and irrelevant evidence and business records is just as serious, if not more so.

It can be further reasoned that a jury in its deliberations is essentially attempting to reach a compromise that all jurors can agree upon. The verdict, therefore, will tend to be guilty on more counts as the amount of evidence showing the defendants are bad and evil increases. Thus, it would seem to be incumbant upon the Courts to attempt to exclude all irrelevant, immaterial and prejudicial evidence. In the Bruton case, supra, the ineffectiveness of limiting instructions was discussed.

Mr. Justice Roberts stated in Lisenba v. California, 1941, 314 U.S. 219, that a denial of due process is "The failure to

observe that fundamental fairness essential to every concept of justice." The Supreme Court reversed a defendant's conviction for armed postal robbery because of a co-defendant's confession implicating the defendant which was admitted in court without a chance for cross-examination. The Court stated: "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." Bruton v. U.S., supra, 391 U.S. 123.

In substance, the Court committed prejudicial error by reason of the aforementioned actions which deprived Petitioner of a fair trial and due process of law, and the Appellate Court should not have condoned such activities which deprived Petitioner of the rights guaranteed him by the Fifth Amendment to the U. S. Constitution.

In the court proceedings on June 8, 1970, the trial court made it clear to all defendants charged in the indictment that they were all going to be treated alike. (R. 185-286.) This Court also assured that the remaining defendants of the Indictment alleged not to be involved in the Horwitz transaction would be tried in separate trials (including the defendants on trial in this action named in other Counts of the Indictment), and that the Court would accept no pleas unless all defendants were treated identically. After the trial, the Court in direct violation of this assurance dismissed or accepted pleas to lessor offenses from the other remaining defendants named in the Indictment. Most of them were allowed to plead

guilty to a misdemeanor and were given suspended sentences.

As a result of a plea bargaining, defendants Reece, Reamer, Rich and Curry pleaded guilty to misdemeanor charges, to wit: 15 U.S.C. 78(j) and 18 U.S.C. 3. The felony charges in the Indictment were dismissed (R. 6266-6326). The Court sentenced each of these said defendants to a one year term in prison and fined them various sums of money, but in all instances suspended the imprisonment and placed them on probation (R. 6512-6716).

Defendant Robert Joseph Muller, Sr., also charged in the same Indictment, entered a plea of guilty to one Count in the Indictment and also pled guilty to some charges transferred from the State of New York under Rule 20. He was sentenced to a total term of ten years, but the sentence on all charges was suspended and the defendant was placed on probation for a period of five years (R. 6717-6731).

Defendant Ernest Eugene Kuhns, Sr., was allowed to enter a plea of guilty on another Information charging violation of 15 U.S.C. 80(b)-6 and 18 U.S.C. 3. He was sentenced to a term of one year, which was suspended and he was placed on probation (R. 6416-6441).

All Counts were subsequently dismissed against defendants Prewitt and Krauthamer who were Government witnesses at the trial of the Horwitz transaction (R. 7072-7073).

Again, we hark back to the dignity and the fairness of the Court. Petitioner relied on the Court's assurances that all defendants were to be treated alike and

all remaining Counts would proceed to trial in planning the defense of this trial. This restricted Petitioner's use of co-defendants to testify in his behalf since they would be reluctant to incriminate themselves in subsequent trials.

In spite of objections of Petitioner and the other defendants, the Court allowed evidence to be introduced on transactions relating to the cases yet to be tried. This was introduced and accepted into evidence on the basis that it showed common scheme and design.

The Petitioner was further prejudiced by the Court's refusal to dismiss all of the other Counts of the Indictment prior to this trial that were not involved in this case. This left Petitioner in an impossible position of having the responsibility to defend in this trial, while still facing subsequent trials on the same Indictment. This impeded Petitioner's right to testify in his own defense in the event that he chose to take the stand. If he chose to testify on his own behalf, he would then be required to answer questions which might incriminate him and be used against him in future trials on other transactions in this Indictment. This influenced the Petitioner in resting at the close of the Government's case and not presenting evidence in his own behalf.

Perhaps a more important factor is that this misrepresentation, intended or not, on the part of the Court reflected upon the Court's integrity. It further brings up an issue of selective prosecution and unequal prosecution and punishment of

other defendants in like circumstances. There is no question that this is a breach of basic justice and fair play. The Court should therefore take cognizance of this unequal treatment.

The United States Supreme Court has held that inconsistency and capriciousness of imposing sentences on defendants similarly charged with the same conduct results in cruel, unusual and unduly harsh punishment contrary to the provisions of the United States Constitution. This was the reasoning in the recent United States Supreme Court cases (June, 1972), Furman v. Georgia (69-5003), Jackson v. Georgia (69-5030)and Branch v. Texas (69-5053), U.S. 33 L.Ed. 346, 92 S.Ct.

The evidence adduced at the trial indicated that Petitioner's conduct and activity was no different than that of any of the other 15 defendants charged in this 50 Count Indictment and was involved to a lessor extent than the majority of the other defendants. Therefore, Petitioner's Constitutional rights have been violated by reason of this inconsistency of punishment. (8th Amendment, U.S. Constitution.)

3. WHETHER THE TRIAL COURT COMMITTED ERROR IN RULING AND INSTRUCTING THAT THE COMMITMENT LETTER WAS A SECURITY AS A MATTER OF LAW, AND DISREGARDING THE DISPARITY IN THE DATES BETWEEN THE DATE OF THE LETTER ALLEGED IN COUNT 5 (DEC. 2, 1965), AND THE DATE OF THE LETTER INTRODUCED BY THE GOVERNMENT (NOV. 29, 1965).

The Court instructed the jury that the letter of commitment (Ex. 624, R. 2818,

3164) was a security as a matter of law and within the definition of 15 U.S.C. 77(b). That definition is as follows:

"The term'security' means any note, stock, treasury stock, bond debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

The Supreme Court has held that "Instruments may be included within any of (The Act's) definitions as a matter of law, if on their face they answer to the name or description." SEC v. C.M. Joiner Leasing Corp., 1943, 320 U.S. 344, 351.

In a later case the Supreme Court stated that in determining the meaning and scope of the word security as defined within the Act, form should be disregarded for substance, and that the emphasis should be on the economic aspects. Tcheretnin v. Knight, 1967, 389 U.S. 332, 336.

In a criminal case involving mineral leases and the issue as to whether these mineral leases on specific pieces of property were investment contracts falling within the definition of a security as

defined by the Federal Securities Act, the Court stated that this question was a matter of fact for the jury, and that it would be a prejudicial error for the judge to decide that it was a security as a matter of law. Roe v. U.S., 1961, 5th Circuit, 287 F.2d 435, 440, cert. denied, 368 U.S. 822.

Quoting from Justice Jackson in the Roe case, supra, "...in a civil action...the preponderence of evidence will establish the case...in a criminal case (the evidence must) meet the stricter requirements of satisfying the jury beyond a reasonable doubt." 320 U.S. 344, 355, 64 S.Ct. 120, 125.

The opinion further stated that "...no fact, not even an undisputed fact, may be determined by the Judge. (citing United Brotherhood of Carpenters and Joiners v. U.S., 1947, 330 U.S. 395, 67 S.Ct. 775) The plea of not guilty puts all in issue, even the most patent truth. In our Federal system, the trial court may never instruct a verdict either in whole or in part."

The Supreme Court has repeatedly indicated that the test before determining whether an instrument is a security under the Securities Act is whether it involves an investment of money in a common enterprise for profits that come solely from the efforts of others. SEC v. W. J. Howey Co, 1946, 328 U.S. 293, 66 S.Ct. 1100; SEC v. Variable Annuity Life Ins. Co., 1959, 359 U.S. 65, 79 S.Ct. 618; Prudential Ins. Co. of America v. SEC, 326 F.2d 338, cert. denied, 377 U.S. 953, 83 S.Ct. 1629.

This letter of commitment in the case at bar did not provide for an investment of money in a common enterprise for profits. The money paid by the alleged victim was a brokerage fee. The intent, as well as how the parties treated this letter of commitment, should also be taken into consideration. The evidence clearly stated that this letter of commitment was not intended, nor treated, as a security, but merely as a promise to secure a loan for a consideration.

If this type of instrument is a security under the definition as per the Securities Act, then any breach of contract involving suspected fraud where means of interstate commerce is used could conceivably be prosecuted by the Federal Government under the Securities Act. A further logical application would require all loan brokers and lending institutions to register all loan commitments with the S.E.C. and, undoubtedly, be required to be licensed as a security broker.

It is apparent that the Federal Government has not extended jurisdiction of the S.E.C. to this extent, nor is it probable that it will since it would almost totally involve all forms of commerce and have unlimited consequences in the scope of enforcement. It is inconceivable that the Congress of the United States intended the Securities Act to be extended to such unlimited and ridiculous applications

In the event of "novel, uncommon or irregular devices, whatever they appear to be, are also reached if it be proved as a matter of fact that they were widely offered

or dealt in under terms or courses of dealing which established their character...." (Emphasis added.) SEC v. Joiner Leasing Corp., 320 U.S. 344, 64 S.Ct. 120.

The Government did not establish proof of any of the following:

(a) That Gus Horwitz was investing money with the defendants for the purpose of making them money.

(b) That Gus Horwitz thought the letter of commitment had any value of its own, or that he was offered or sold an instrument that he in turn could offer or sell or negotiate to sell.

(c) That Gus Horwitz thought that he was receiving a security when he dealt with the other defendants.

Since the Government failed to establish that the letter of commitment was a security, Count 5 of the Indictment would of necessity have to fail considering that it was an integral part of that Count. Therefore, the trial court commited prejudicial error by instructing the jury that the letter of commitment was a security as a matter of law.

In considering the second part of this issue relating to the discrepency in dates of the letter of commitment, the case of Smith v. U.S., 6th Circuit, 1956, 230 F.2d 935 (quoted in the Roe case, supra) appears to be relevant to this issue. In that case the Court stated that "It is error to issue instructions to the jury which assume as a fact material matters not established by evidence."

Evidence in a criminal case must

correspond with the allegations of the Indictment. The rationale of this requirement is to inform defendant of the charges and to protect him against prosecution of the same offense at some later date. Berger v. U.S., 295 U.S. 78, 55 S.Ct. 629.

Since the Petitioner was charged with an offense relating to a specific document (letter of commitment dated December 2, 1965) alleged to be a security transmitted through the mails, a variance between the pleading and the proof of date of such letter might be considered a material variance as a matter of law. Even if it is declared to be an immaterial variance, this discrepency would seem to make it clearer that the trial court's instruction to the jury was in error.

4. WHETHER THE TRIAL COURT COMMITTED ERROR BY FAILING TO SUSTAIN PETITIONER'S MOTION FOR A SPEARATE TRIAL.

It appears to be the weight of authority that the granting of severance is left to the discretion of the trial judge, and that his ruling will not be disturbed without positive proof of abuse of discretion as evidenced by prejudice to the defendant. White v. U.S., 5th Circuit, 1969, 415 F.2d 292, cert. denied, 397 U.S. 993 (1970).

However, the trial judge has a "continuing duty at all stages of the trial to grant severance if prejudice does appear." The question as to what constitutes prejudice was considered in Rizzo v. U.S., 304 F.2d 810, cert. denied, 371 U.S. 890 (1962). That case involved an alleged

conspiracy to purloin and steal money from a trust company. The Court of Appeals stated, "...in a joint trial there will be evidence against one defendant which is not evidence against another defendant does not require separate trials."

In Glazerman v. U.S., 10th Circuit, 421 F.2d 547, cert. denied, 398 U.S. 928 (1970), the defendants were being tried for mail fraud and conspiracy. They were denied separate trials. The appellant Glazerman urged that the trial court had erred in denying separate trials since the jury was allowed to consider out of court statements made by other defendants against Glazerman. The Court of Appeals pointed out that Glazerman and his attorneys had a chance to examine the statements before they were introduced, but his counsel failed to object to their introduction at the trial and the defendants involved later testified at the trial. Thus there was a chance for cross-examination by Glazerman. Also the Court of Appeals pointed out that if it was an error, it was harmless because the statement did nothing more than question Glazerman's credibility. It further pointed out that "The case against (Glazerman) was so overwhelming that this (error) was harmless beyond a reasonable doubt."

The case of Bruton v. U.S., supra, 391 U.S. 123, involved a case in which an oral confession of one defendant, who did not testify in a joint trial, could not be admitted into evidence as a limiting instruction would not be effective and deprive the other defendant of his Sixth Amendment

rights. The Court discussed Rules 8(b) and 14 of the Federal Rules of Criminal Procedure which deal with joinder of defendants. The Court quoted from an explanation of the Rules by the Advisory Committee on Rules and said: "A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice....

"The purpose of the Amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance."

This point was considered in the Glazerman case, supra, and distinguished since the defendants in that case testified.

Since the trial judge in the case at bar obviously relied on the Glazerman case, it is necessary to distinguish it from the case at bar. In the Glazerman case the Court ruled that statements made by co-defendants against Glazerman was a harmless error considering the overwhelming case against the defendant. In the case at bar, there is no overwhelming evidence against any of the defendants. There is barely a case without the evidence concerning other transactions, which were not even at issue in this trial. The case at bar can be distinguished on the basis that we are faced with more than statements by co-defendants and the error in allowing

evidence of other transactions to be admitted is harmful.

Although defendants were being tried for only Counts 5, 6, 8, 9, 10 and 11, it would appear that the jury in all liklihood concluded that the defendants were on trial for all of the alleged crimes in these unrelated transactions. During the course of the trial it is quite probable that that is what the jury concluded. In the Bruton case, supra,only one defendant testified, whereas in the Glazerman case, supra, full cross-examination was possible. There also was no confession involved in the Bruton case, supra.

The case at bar involved numerous documents of defendants' and statements of third parties relating to the conduct of the co-defendants and non-defendants. Therefore, it would appear that the Bruton decision would be applicable considering these numerous admissions against the Petitioner and the prejudice resulting therefrom.

Rizzo v. U.S., supra, declared that evidence against one defendant which is not evidence against another is not so prejudicial as to require separate trials. This case can be distinguished on the basis of degree. A slight lack of identical evidence will not automatically be regarded as prejudicial. However, as the evidence becomes more and more dissimilar, the possibility of prejudice against one of the defendants becomes greater.

In Milam v. U.S., 5th Circuit, 1963, 322 F.2d 104, cert. denied, Sub Nom Kimball v. U.S., 377 U.S. 911, the Court found that

the same evidence would be needed to convict both of the defendants, and that it would be admissible if they were both tried separately. Thus there was no prejudice.

It is quite apparent in the case at bar that almost all of the evidence that was admitted in the trial would not be admissible in separate trials. Therefore, since it would not be admissible, this would constitute prejudice.

In conclusion the Court committed error in failing to sustain Petitioner's motion for separate trial on June 8, 1970. (R. 221-234.)

5. WHETHER THE TRIAL COURT COMMITTED ERROR IN ITS REFUSAL TO RULE AND/OR SUSTAIN PETITIONER'S MOTION FOR JUDGEMENT OF ACQUITTAL UNDER RULE 29(a) MADE IMMEDIATELY AFTER THE GOVERNMENT RESTED, AND IN REFUSING TO MAKE A RULING UNTIL AFTER THE TRIAL.

After the Government had rested, Petitioner made a motion for Judgement of Acquittal under Rule 29(a). The trial court refused to rule on this motion, and reserved its ruling until after the trial. At that time Petitioner rested (R. 5284).

In Jackson v. U.S., 5th Circuit, 1958, 250 F.2d 897, the Court held that a trial court cannot reserve rulings on a Rule 29(a) motion made at the close of the Governments case.

In a later case emanating from the 5th Circuit, the Court appeared to modify its ruling in the Jackson case while considering

the conviction of a man for unlawful transportation and concealment of a quantity of marijuana. The Court said, "In this circuit when a motion is made for a judgment of acquittal at the close of the Government's case, the trial court is not permitted to reserve his ruling but must rule at that time. However, when such motion is made after all the evidence...has been submitted, the Court may reserve its ruling and submit the case to the jury.... Where a trial court reserves its ruling at the close of the Government's case the error is harmless if the evidence is sufficient to sustain a conviction when the Government rests." Montoya v. U.S., 5th Circuit, 1968, 402 F.2d 847, 849-50.

As aforementioned, the evidence was insufficient to sustain a conviction of Petitioner in the case at bar. Even though the Court will consider evidence in a manner most favorable to the Government in ruling on this motion, there seems to be little question that evaluation of the Government's evidence in the most favorable light could not under any stretch of the imagination formulate a prima facie case against Petitioner. Therefore, the Court abused its discretion in ruling on this motion.

It should be further noted that all defendants, with the exception of Darel Dean Martin, rested after making identical motions under Rule 29(a). Defendant Martin testified in his own behalf. The jury learned for the first time that defendant Martin had previously been convicted of a fraud by the Federal Government,

and was presently an inmate at the Federal prison at Leavenworth, Kansas (R. 5416-5417, 5544).

This undoubtedly caused additional prejudice to Petitioner, and again placed him, by inference, in the company of bad men. If the Court had ruled on the Rule 29(a) motion at the time it was presented, Petitioner could have been saved from this prejudicial evidence.

CONCLUSION

It is Petitioner's contention that due to the enumerated errors, this Court should order a reversal of Petitioner's conviction on Counts 5 and 8 of the Indictment, or that Petitioner be granted a judgment of acquittal, or, in the alternative, be granted a new trial separate from the other defendants, or, if granted a new trial, this Court issue a Mandate that the question of whether or not the letter of commitment was a security should be decided as a question of fact.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRI

FOR THE DISTRICT OF KAN

UNITED STATES OF AMERICA,

Plaintiff,

KENNETH CHILDS, et al.,

UNITED STATES COURT OF APPEALS (App B.)

TENTH CIRCUIT

MAY TERM, 1972

FILED
United States Court of Appeals
Tenth Circuit
JUN 26 1972
HOWARD K. Phillips
Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RANDELL WARREN AUSTIN, Defendant-Appellant.	No. 72-1016
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM E. BALES, JR., Defendant-Appellant.	No. 72-1017
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. IRVING WELLESLEY BEEMAN, Defendant-Appellant.	No. 72-1018
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHARLES A. SAVIDGE,	No. 72-1019

Carrell L. Johnson for Appellant Wendell Warren Austin.

Robert A. Coldsnow for Appellant William E. Bales, Jr.

Clyde Wendelken for Appellant Irving Wellesley Beeman.

Theodore H. Hill and Thomas H. Graber for Appellant Charles A. Savidge.

Edward H. Funston, Assistant United States Attorney (Robert J. Roth, United States Attorney, on the brief) for Appellee United States of America.

Before LEWIS, Chief Judge, DOYLE, Circuit Judge, and HATTON, District Judge.

DOYLE, Circuit Judge.

The above named defendants were tried and convicted on charges of securities fraud, contrary to 15 U.S.C. § 77q and 18 U.S.C. § 2 (aiding and abetting), and mail fraud, contrary to 18 U.S.C. § 2314(2), 18 U.S.C. §§ 1341, 1342 and 1343 and 18 U.S.C. § 2. The appellants were jointly charged with numerous other individuals in an indictment which contained a total of 50 counts. Each of the four defendants was convicted on count 5 of the indictment, a securities fraud charge, arising under § 17 of the Securities Act of 1933, 15 U.S.C. § 77q. In addition, appellant Austin was convicted on Count 8, mail fraud, 18 U.S.C. § 1343 and 18 U.S.C. § 2 (aiding and abetting). Appellant Savidge was convicted on Count 11 of violating 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 2

(aiding and abetting). Appellant Bales was in addition convicted under Count 6, 18 U.S.C. § 2314(2) and 18 U.S.C. § 2; Count 9, mail fraud (18 U.S.C. § 1343 and 18 U.S.C. § 2 (aiding and abetting); Count 10, 18 U.S.C. § 1341 (mail fraud) and 18 U.S.C. § 2; and Count 11, 18 U.S.C. § 1341 and 18 U.S.C. § 2.

Most of the defendants filed motions for severance, which motions were denied. At the same time, the trial court, instead of proceeding on all of the counts contained in the indictment, severed out certain of the charges based on particular transactions and proceeded to trial on Counts 5, 6, 8, 9, 10 and 11 which arose from the so-called Horwitz dealings. The idea was that the defendants named in those counts of the indictment would be first tried and that separate trials would be held on other transactions. As it turned out, however, the only trial conducted was with respect to the mentioned counts, and the convictions on these counts are the only matters before us on appeal.

Prior to trial two of the defendants, Charles Krauthamer and Darel Martin, sought to enter pleas of nolo contendere which the court refused to accept, and subsequent to this refusal the defendant Krauthamer tendered a plea of guilty to one count of the indictment and the government offered to dismiss all other counts. This plea

the trial court refused to accept. However, at a subsequent time before trial the court did allow the government to dismiss Counts 5, 6, 8, 9, 10 and 11 of the indictment as to the defendants Krauthamer and Edwin W. Prewitt.

As previously mentioned, there were numerous transactions some of which were charged in the indictment and some of which were not. The bulk of these transactions was offered to show the existence of a plan, scheme or design to defraud and also for the purpose of showing the requisite criminal intent. The lead transaction was, of course, that in which one Gus Horwitz was named as the object of the scheme and artifice to defraud and which was set forth in Counts 5 through 11 (except 7).

The definitive count of the indictment in the Horwitz transaction was Count 5 which alleged that from a time prior to November 5, 1965, continuing to March 24, 1966, the defendants devised a scheme to defraud Horwitz by means of false pretenses, representations and promises constituting a scheme and artifice to defraud. Particularly, it was alleged that:

1. Defendants would provide loan commitments to Horwitz guaranteeing a loan in the amount of $750,000.00 and at the same time obtain a fee of $14,500.00 from Horwitz.

2. Lincoln Mortgage Company, Inc. and Investment Corporation of America were to obtain this loan.

3. False financial statements were given.

4. The scheme was executed by use of the mentioned financial statement together with the letter of commitment of Lincoln Mortgage Company for which the advance fee was paid by Horwitz. The letter of commitment was alleged to be a security.

The further counts mentioned above were, as noted, all based on the Horwitz transaction and all of these incorporate the allegations of Count 5 and contain jurisdictional allegations regarding the use of the mails.

The principal witnesses in the case were Gus Horwitz and one Frank McCall who was an associate of Horwitz. The evidence showed that Horwitz and McCall were Illinois residents and were engaged in real estate developing in Illinois. It was in connection with the interest of Horwitz in the acquisition of the Fox Valley Country Club in Aurora, Illinois which brought Horwitz into contact with the defendants. McCall learned of the existence of the Lincoln Mortgage Company, Inc. of Wichita, Kansas, having been told that it was in the business of issuing commitments for loans. Thereupon McCall telephoned Lincoln Mortgage and talked to defendant Bales who was

ice-President of this Wichita, Kansas company. At the equest of Bales, McCall submitted certain documents. On ovember 9, 1965, Darel Martin, the Treasurer of Lincoln ortgage, advised that the proposed loan would be submitted o the loan committee for its approval.

The evidence disclosed that the following transpired:

1. Bales told McCall and Horwitz over the telephone hat Lincoln Mortgage would grant the loan if they would ome to Wichita and deposit a $15,000.00 initial fee.

2. On November 29, 1965, McCall and Horwitz received opies of a commitment letter signed by Martin purporting o grant a first mortgage loan in the amount of $750,000.00. his was not an outright commitment but a back-up commitment uaranteeing the making of the loan by others.

3. After receiving the commitment letter, McCall and orwitz flew to Wichita for the purpose of assuring the unding of the commitment.

4. A check for $7,500.00 was presented to Bales and nother check for $7,000.00 was given to Lincoln Mortgage ompany soon after that in payment of the initial commitment ee. McCall paid the remaining $500.00.

5. On the occasion of this visit McCall and Horwitz ere introduced by Bales to appellant Savidge, who said hat his firm, Savidge and Associates, Inc. of Kansas City, issouri would provide <u>interim</u> financing (emphasis supplied).

6. A funding agreement was worked out between Savidge and Horwitz, and the latter left Wichita believing that the interim financing would be processed by Savidge in a few days and the money would be available immediately thereafter. Another $22,500.00 in commitment fees was due and payable at the time of interim funding. The interim financing never materialized and hence this sum did not become due and payable.

7. On December 10 Savidge sent a letter to McCall and Horwitz saying that his company had given its verbal approval of the loan.

8. During the ensuing delay there were numerous telephone conversations in which appellant Savidge stated the money was set and only awaited completion of the paper work. Horwitz was required to renegotiate his option to purchase the country club.

9. Because of questions as to the financial backing of Lincoln Mortgage, Horwitz was furnished with a guarantee from another company, the Continental Leasing Corporation, together with a letter of reference from a Dallas bank in respect to Continental Leasing Corporation.

10. On December 22, 1965, Horwitz and McCall received a letter confirming the funding agreement with Savidge and Associates.

11. At the same time Horwitz and McCall received another letter from still another firm, Investment Corporation of America, signed by one Edwin W. Prewitt, President (Horwitz testified that he had never previously heard of either Prewitt or Investment Corporation of America).

12. On December 20, on the occasion of a McCall visit to Wichita, it was learned from appellant Bales that Lincoln Mortgage would not fund the commitment, but that Investment Corporation of America would. The necessary papers to effectuate this were executed and a copy of this undertaking of Investment Corporation was sent to the seller of the country club.

13. On December 23 Savidge and Associates sent a telegram to McCall advising that it would fund the commitment within 90 days on receipt of documentation from Investment Corporation of America. A week later McCall received a copy of a purported financial statement of Investment Corporation of America.

14. On December 27 Savidge and Associates sent another telegram to McCall again stating readiness to proceed with funding on receipt of complete information and documentation from Investment Corporation of America. Contemporaneously Savidge explained by telephone that he

s waiting for Investment Corporation of America's
nancial statement and information as to its method of
oviding the long-term financing.

15. Thereafter additional balance sheets of Investment
rporation of America were sent to McCall and Horwitz
gether with an announcement of the acquisition by
vestment Corporation of America of a new silver mine in
lorado.

16. On February 4, 1966, McCall received a letter
om Prewitt of Investment Corporation of America
ologizing for the delay.

17. On February 14 a telegram from Savidge and
sociates was sent to McCall promising to close the loan
bruary 24 on which day Savidge was to come to Aurora,
linois to deposit money in a local bank.

18. On the appointed day two telegrams were received,
e from Investment Corporation of America signed Prewitt,
ating displeasure that the interim financing had not been
ovided, and the second from Savidge stating that Prewitt
d told him not to close the loan.

19. Next, Savidge called from Chicago advising McCall
contact Prewitt, and on calling Prewitt was told that
e, Prewitt, could not understand what the trouble was, but
at funds would be available; that they had somebody in

llywood and somebody in Lake Tahoe (ready to advance e money).

20. McCall warned Prewitt that "We are at the end the line now and we are getting ready to go to the thorities on it and we want our money back."

21. Some days later McCall spoke to Prewitt and lked also with appellant Austin who was present with ewitt. Austin advised that he had a depositor with okerage money.

22. Austin, on March 3, 1966, sent a confirming legram that he had an investor with $750,000.00 cash ich would be deposited by wire with a savings and loan stitution. When McCall attempted to use the telegram he arned that the Home Building and Loan bank in Aurora uld not accept such a compensatory deposit.

23. On March 4 McCall received a telegram from fendant Beeman, as President of Executive Title and Trust mpany (still another company) in Incline Village, Nevada, vising that Executive Title was holding a trust deposit back up the Investment Corporation of America commitment.

24. Finally, McCall and Horwitz sent a demand letter the various companies demanding the return of their ney. A complaint was then made to the Postal authorities en other financing was completed.

Krauthamer and Prewitt testified as government witnesses at the trial of the four named defendants on counts 5, 6, 8, 9, 10 and 11. Following conviction of the four named defendants on some or all of the counts of the Horwitz transaction, the government elected not to proceed with the other transactions which had been severed out. It dismissed these counts not only as against the four defendants and Martin, but also as against Prewitt and Krauthamer. Also subsequent to the trial certain of the other defendants were allowed to plead to lesser charges which were set forth in a superseding information. These individuals were granted probation.

Testimony as to the allegedly false financial statements was offered through Krauthamer who had been a defendant but who was dismissed. He is shown to have been a Certified Public Accountant, and from him it was learned that the financial statements were prepared based upon information given to him by Prewitt. In this manner he prepared statements for both Lincoln Mortgage Company and Investment Corporation of America. He made no real effort to check the financial data furnished to him by Prewitt. According to Prewitt's testimony he lacked personal knowledge as to the numbers that he had given to Krauthamer, but he said that he assumed that Childs was wealthy and that what he had been told was true.

It is to be noted that one Kenneth Childs appeared to be the central figure in Lincoln Mortgage and in the operation generally as a whole. Childs died prior to the trial, and it is the tendency of the defendants at bar to shift the blame to him and to say that they were dupes. The defendant Darel D. Martin, who was Secretary of Lincoln Mortgage, died pending this appeal.

In addition to the Horwitz-McCall transaction there were numerous others offered on the theory of similar acts and transactions to establish the mode of operation and to prove plan, scheme, design, knowledge, intent and participation in the operation as a whole of the other defendants. The pattern in each of these other transactions was substantially the same as that shown in the Horwitz transaction. It called for the payment of an advance fee followed by an interim financing fee and the use of a commitment letter plus numerous guarantees, and as in the case at bar the defendants and corporations were freely substituted for the obtaining of the money (which, according to the prosecution, was the primary purpose for the defendants' activity) or to maintain the level of the borrower's confidence. The government's theory was that the scheme was a so-called advance fee loan scheme or device.

12

This case was tried over a period of six weeks and
s in preparation for more than two years. The post-
nviction motions and proceedings required at least an
ditional three or four months following the conviction
ich occurred September 3, 1970. There were extensive
retrial proceedings at which the defendants were furnished
ll opportunity to examine the proposed exhibits and
her evidence which was to be relied on by the government
its effort to obtain convictions.

The defendants raise numerous arguments, most of which
al with the manner of conducting the trial. For example,
e alleged error of the court in receiving some of the
idence of similar offenses prior to receiving evidence
to the details of the Horwitz acts and doings, and
mplaint is made that the court did not finally rule on
e admissibility of the exhibits at the time that these
hibits were identified and offered. Instead the trial
urt reserved final ruling until the latter days of the
ial. Defendants also complain about the vast number of
hibits that were received, some of which were not shown,
is contended, to have been tied to particular defendants.

All of the defendants maintain that the trial was
rked by mass confusion and that they were thereby deprived
a fair trial. Most of these arguments are not specific

and pointed, whereby particular evidence can be considered, and thus it is impossible to test and evaluate these arguments.

From a reading of all of the briefs we have concluded that the numerous and varying contentions can best be considered under the following headings:

1. The sufficiency of the evidence as to each of the defendants.

2. Whether the defendants were entitled to a severance.

3. Admissibility of the similar offenses and whether the court erred in allowing some of the similar offenses to be received in evidence prior to the presentation of the Horwitz transaction.

4. Whether the court erred in reserving ruling on the relevance and materiality of the exhibits until the close of all the evidence.

5. Whether the court erred in its holding that the November 29 commitment letter of Lincoln Mortgage was in law a security within the meaning of § 17 of the Securities Act of 1933 and whether there was a factual issue in connection with the submission of this letter.

I.

SUFFICIENCY OF THE EVIDENCE

The defendants were, as noted above, all charged with both securities fraud and mail fraud, and all except one of the defendants were convicted on counts of the indictment which charged violations of both statutes. Accordingly, it was incumbent on the government to establish in accordance with the charge that the defendants employed a scheme or artifice to defraud and that they executed it by means of false pretenses, representations and promises, all for the purpose of obtaining the payment of advance fees amounting to a total of $37,500.00, the initial fee being $15,000.00.

Section 17 of the Securities Act of 1933, 15 U.S.C. § 77q, declares unlawful the offer or sale of any security by the use of instruments of interstate commerce involving the employment of a device, scheme or artifice to defraud. The mail fraud statute similarly prohibits the device of a scheme or artifice to defraud or obtaining money by means of false pretenses, representations or promises coupled with the use of the mails in the execution of said scheme or artifice. So the elements of the two offenses are similar although not the same. One difference is that the defendant in a securities fraud case must have sold or

ffered to sell a security and the scheme or artifice to efraud must have been employed in connection therewith. he security element is discussed hereinafter under a eparate heading.

The defendants were also alleged to have aided, abetted, ounseled, commanded, induced or procured commission of an ffense contrary to 18 U.S.C. § 2.

The defendants do not seriously contend that the overnment failed to produce evidence to establish the xistence of an artifice or scheme to defraud. Rather, he emphasis is on the lack of evidence to support the onviction of the defendants individually. We hold, owever, that the evidence is amply sufficient to justify onviction of each of the defendants and of all of them.

The evidence clearly establishes that this was a ooperative venture in which each of the four defendants nd others played an integral part. We need not determine hether Childs was the central figure because he is not efore the court and it is not essential that the principal n the enterprise be identified as long as some person was rincipal. See Colosacco v. United States, 196 F.2d 165, 7 (10th Cir. 1952), and Hendrix v. United States, 327 2d 971, 975 (5th Cir. 1964). Not only was it a cooperative nterprise, but it was also shown to have been fraudulent.

t is true that it took the form of valid transactions, but his is not uncommon and, despite the use of contracts and ther forms common to ordinary business transactions, the raudulent character of the endeavor was not thereby isguised.

From the facts which have been outlined, it is anifest that the Horwitz transaction was itself shown to ave been corrupt. This type of advance fee loan transaction, which a loan never comes to pass and in which the fee is tained by various forms of promises and representations at a loan will be forthcoming, is a familiar method for taining money from members of the public who are sperately in need of financing and cannot obtain it rough ordinary sources. The borrower, even though he is phisticated in the ways of business, is necessarily gressed by the front presented - the facade of documents d corporations - so that he does not suspect that its rpose is to obtain his money and to merely promise him loan. This fact, however, at last emerges from the ilure to fulfill the commitment and from the numerous her transactions, all of which operate in the same general nner and none of which ever produce the promised financing. it were necessary in law for each individual to have rticipated at each and every stage of the process (the

reliminary stage, the obtaining of the fee stage and the ery lengthy stalling stage), there could be a problem. owever, the aiding and abetting statute which is ecifically alleged and cited in the indictment renders his unnecessary by declaring that one who aids, abets, unsels, commands, induces or procures the commission of offense is a principal.

In the case at bar the four defendants were shown to ve had substantial participation in the Horwitz transaction. itially appellant Bales was involved at the preliminary ages as was the defendant Darel Martin, since deceased. les had the original communication with McCall and rwitz, and Martin signed the commitment. On the occasion their first visit to Wichita they came into contact with pellant Savidge and were introduced to the notion of terim financing which in turn called for an additional yment of $22,500.00. Soon thereafter Edwin Prewitt came to the picture through Investment Corporation of America, substitute funding company. There followed communications tween Horwitz and Savidge and Horwitz and Prewitt in which vidge and Prewitt sought to blame the delay on one other. Finally, appellant Austin came on the scene also mising to come forward with the funds, and in the final ages appellant Beeman and his Executive Title and Trust

mpany of Incline Village, Nevada came forward as a uarantor. Thus, each of these four named defendants and thers played a part, first, in the obtaining of the oney and the sale of the commitment letter, and, secondly, n stalling Horwitz and McCall and in quieting their pprehensions and anxieties. Thus, there was a scheme and evice which was continuing. It did not cease once the nitial amount of $15,000.00 was paid. The purpose of the ontinuation of the scheme was to prevent disintegration f the first part involving the obtaining of the money. he remaining three points (three percent) in the amount f $22,500.00 had not been collected and remained an bjective.

Under the aiding and abetting statute, once the evice, scheme or artifice to defraud has emerged, the uestion is whether one has participated in the criminal ransaction or transactions shown to have been perpetrated. ee United States v. Harris, 441 F.2d 1333, 1336 (10th Cir. 971); King v. United States, 402 F.2d 289, 290-291 (10th ir. 1968); White v. United States, 366 F.2d 474, 476 10th Cir. 1966); Roth v. United States, 339 F.2d 863, 865 10th Cir. 1964); Colosacco v. United States, 196 F.2d 165, 67 (10th Cir. 1952).

It is, of course, essential that a defendant willfully and knowingly associated himself with the unlawful venture and willfully participated in it as he would in something he wishes to bring about or to make succeed. See King v. United States, supra, and Roth v. United States, supra.

The fact that two of the defendants, namely, Beeman and Austin, surfaced as a part of the Horwitz transaction at a relatively late stage does not excuse them, if in fact they aided and abetted the commission of the offense. It is inferable from the evidence that both of these appellants embraced the enterprise and ratified it in that they were helping to preserve the fruits of the transaction and thus carrying out its objectives. It was for the jury to assess whether they acted with knowledge.[1] The numerous similar transactions attest to their participation, for in

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1. In the words of Judge Learned Hand in United States v. Paglia, 190 F.2d 445, 448 (2d Cir. 1951), to be an accessory one must:

> . . . make the venture his own; the crime must be a fulfillment in some degree of an enterprise which he had adopted as his; his act must be in realization of his purpose.
> 190 F.2d at 448.

See also Nye & Nissen v. United States, 336 U.S. 613, 620 (1949), and Wyatt v. United States, 388 F.2d 395 (10th Cir. 1968).

me instances the evidence shows that they took the ead.

Indeed, the similar transactions shed light on the istence of the scheme or artifice to defraud and the llful participation of all four of the defendants. One teworthy fact revealed by these is that not a single loan s shown to have been placed or consummated.

A summary of most of these similar offenses is appended this opinion. They demonstrated in clear terms that the fendants acted with the requisite corrupt intent.

We conclude that the evidence is much more than fficient.

II.

THE SEVERANCE QUESTION

The defendants sought trials separate and apart from eir codefendants on the ground that there was evidence missible against codefendants which was at the same time admissible as to them. The trial court denied this tion, but did sever the transactions for the purpose of ial. In determining that the Horwitz series of counts uld be tried first, it was contemplated that the other nsactions which were alleged in other counts of the dictment would be tried subsequently. As it turned out,

e subsequent trials did not take place, and now it is gued that the court's acceptance in evidence of numerous nsactions as similar offenses other than the Horwitz ries of events resulted in a substantial prejudice.

In examining the motions we note one obvious fficiency-their attack is broadside; they fail to document e prejudicial evidence. Appellant Savidge does say that was involved in only eight of twenty transactions. As own by the Appendix, the defendants Bales, Savidge and stin were prominent participants in numerous of the ransactions during the entire period of the illegal nterprise. It is true that appellant Beeman's role was ss prominent than the others. He did take positive action the substantive offense, the Horwitz events, in that he fered a back-up or guarantee and utilized one of his rporate names, Executive Title and Investment Company, for e purpose. He participated also in the Jones, Jones and bbs incidents, and although he came in late it was open the jury to conclude that he embraced the early events ich started in 1964. Significantly he was engaged tively and prominently in two of the later transactions, W.A.A. Oil transaction and the Glen Dornie transaction, h of which commenced in the fall of 1966, and so from ly 1966 forward he was shown to have been a participant.

It is axiomatic that the granting of a severance so as to avoid a joint trial with others is a matter of discretion, and it is most difficult for the judge to gauge possible prejudice in a case such as the present one at the time the motion is made. This is especially true where, as here, the motion is a naked one which gives the trial court no specific evidence of prejudice.

Professor Moore points out that if all that is necessary to avoid a joint trial is a showing of prejudice, there would be few, if any, multi-defendant trials. 8 Moore's Federal Practice ¶ 14.04. The author goes on to say:

> * * * This is because the very fact of joinder is prejudicial to one or more of the defendants. Thus, the following inherently prejudicial factors do not give rise to severance: that another defendant is charged with more serious offenses, that defenses of codefendants are generally antagonistic, or that defendant is subjected to additional expense by the joint trial. What these decisions ultimately come down to is this: A defendant is not entitled to a separate trial "merely" because it might offer him a better chance of acquittal.
>
> The problem of inherent prejudice is particularly acute in conspiracy cases. It is common for defendants in these cases to defend themselves by shifting blame to each other. Thus, the prosecutor's job is made easier.

> In addition, the conspiracy charge offers the prosecution exceptional procedural advantages because statements made by any co-conspirator "in furtherance of the conspiracy" are admissible against all. Even where evidence against one defendant is not technically admissible against another defendant, it may still be admitted, subject only to "limiting instructions" to the jury.

And Judge Learned Hand has said:

> That they may be convicted merely because of their association is possible, though it is certainly no more than a speculation to assume so; but there is no practical alternative except, as we have said, to give them immunity. The chance that a joint trial will not as to them be a fair trial, has to be balanced against the fact that it is a joint trial or none. Indeed, if we were to accept the argument, there would really be an end of trials for jointly conceived, or jointly executed, crimes, except in cases of the simplest character.

United States v. Cohen, 145 F.2d 82, 95-96 (2d Cir. 1944). And so faced with a series of lengthy trials on the varying transactions, the trial court no doubt deemed it impossible to sever even further by separating the defendants, and undoubtedly he regarded it as impractical to do so in view of the fact that a common scheme was charged which had continuity of purpose and similarity of method. We cannot say that the decision to proceed as the trial court decided, by severing the transactions and cautious use of limiting

instructions, constituted prejudicial error as to any of the appellants, including Mr. Beeman.

Throughout the trial the court repeatedly instructed the jury that, as a necessary prerequisite to consideration of the similar offenses, the evidence must first establish the doing of the act charged in the indictment by the particular defendant. The court went on to instruct the jury that if the guilt of the defendant was established in the main charge, only then could the jury consider evidence of an alleged act of a like nature insofar as it established the state of mind or intent in respect to the offense charged and only insofar as the act was part of a uniform scheme or plan of operation on the part of the accused. The several instructions given were extensive, and finally the judge repeated the admonition in his final charge.

The condition here is not unlike that which was presented to this court in Beckwith v. United States, 367 F.2d 458 (10th Cir. 1966). There the appellants argued that evidence as to a coactor, one Jones, had been erroneously received involving as it did Jones' acts at a date prior to the earliest date that Beckwith had been identified with the fraudulent scheme. The trial court held there, however, that the evidence was admissible against Beckwith and his

codefendant Hayden if they had knowingly and willfully participated in the scheme and that the questioned statements pertained to,and were in pursuance of, that scheme. The court held that neither the testimony nor the instruction called for reversal.[2]

The present case is much more similar on its facts to Lowther v. United States, 455 F.2d 557 (10th Cir. 1972), wherein it was concluded that there was evidence of a scheme to defraud and participation by the defendants in it. Similarly, our decision in Glazerman v. United States, 421 F.2d 547 (1970), is not inconsistent with our present ruling. The holding in Glazerman was that the defendants could not be found guilty of substantive offenses which had occurred prior to their entry into the conspiracy, and thus the question in Glazerman was not one of admissibility of similar offenses.

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2. The opinion is unenthusiastic about the instruction used, but noted that there had been no objection to it. In the case at bar the problem is different in that it involves the existence of an overall scheme and participation in it by the several defendants. There is evidence here which would have justified the jury in concluding that all of the defendants including Beeman embraced the total scheme with all of its ramifications. The jury was also at liberty to conclude that one or more of the defendants had not ratified or approved some transactions or some prior events.

Finally, neither Krulewitch v. United States, 336 U.S. 440 (1949) nor Bruton v. United States, 391 U.S. 123 (1968), which are relied on by the appellants, is applicable. Both of these were concerned with extra-judicial inculpatory statements which had been made by co-conspirators subsequent to consummation and termination of the conspiracies.

We perceive no prejudicial error in the rulings of the court with respect to the admissibility of this evidence or in the court's denial of the defendants' motions for severance.

III.

ALLEGED ERROR ARISING FROM TRIAL COURT'S RECEIVING EVIDENCE OF SIMILAR TRANSACTIONS PRIOR TO PROOF IN SUPPORT OF THE SUBSTANTIVE CHARGES

We have sufficiently discussed the relevancy of the similar transaction evidence and the specific problems which have arisen in connection with the individual defendants. It remains to consider whether there was a gross abuse of discretion in the order of proof. Some of the defendants at least contend that they were denied a fair trial and deprived of due process of law because the trial court allowed the district attorney to postpone presentation of proof in support of the Horwitz transaction (Counts 5, 6,

8, 9, 10 and 11) and to proceed first to call witnesses to the similar transactions. The argument is that it produced mass confusion.

First, the evidence in support of the Horwitz transaction was substantial. Second, the difference between this evidence and the evidence regarding the similar transactions offered for limited purposes was made clear to the jury. What the defendants are complaining about is the immense scope and extent of the similar transaction evidence, but this again was a discretionary matter. In Beckwith v. United States, supra, it was said:

> * * * While testimony as to things done or said by one of the co-actors is admissible if there is evidence that the defendants were active participants in the fraudulent scheme, the court may, in its discretion, permit the proof of participation to follow evidence as to things said and done by the confederate, as was done in the case here. Briggs v. United States, supra; Bartlett v. United States, supra.
> 367 F.2d at 460.

In the case at bar this variation in the order of proof would appear to have been for the purpose of accommodating certain of the witnesses. In view of the care taken by the trial court in instructing the jury, and having in mind that the several transactions were, although quite similar in pattern, distinct in other respects, we are unable to share the views of counsel that this constituted prejudicial error.

IV.

POSTPONEMENT OF RULINGS ON EXHIBITS

Nor can we find error in the action of the court with respect to exhibits. It appears to us that the trial court received the exhibits conditionally and subject to a final ruling when all of the evidence was in. Counsel could not have been misled into believing that these exhibits might not be received because all of the indications were to the contrary. The judge simply wished to finally decide the matter in the light of the testimony.

It is also important to consider the fact that the defendants through their lawyers had had access to these exhibits prior to and during the trial and, therefore, there was no element of surprise. Once again it is the vast extent of the documents which is the main source of complaint. The words of Judge Learned Hand in United States v. Cohen, supra, are fully applicable here:

> * * * The chief complaint, often repeated, we have already considered; it is that the evidence was so manifold and complicated that the jury was sure to be confused and lose track of the real issues. We shall add nothing to what we have said except that, if the objection is valid, a prosecutor, faced with such a web, will be forced to single out the most important malefactors and let the small fry escape; for the burden upon the witnesses and upon successive

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juries of repeated trials would be intolerable.
* * *
145 F.2d at 91.

Defendants also argue that the exhibits were not adequately identified. The fact that copies rather than originals were used is, of course, of no significance, and it is not claimed that any of the documents were not authentic or genuine. So this point is also non-meritorious.

V.

THE RULING THAT THE COMMITMENT LETTER WAS AS A MATTER OF LAW A SECURITY

All of the defendants have centered on the present issue contending that it is improper for the trial court in a criminal prosecution to fail to submit each and every issue to the jury. In its instruction the court read the statute to the jury and went on to state that if there was a letter of commitment, that as a matter of law such was a security within the meaning of the statutory definition.[3]

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3. The full statement of the court is as follows:

> Now, we talk about "security". With reference to Count 5, I instruct you that the term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participating in any profit-sharing agreement, investment contract, or in general,

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We are of the opinion that the action of the trial court was not reversible error.

The intent of Congress was that the Securities Act and the term "security" should be construed broadly. See Lehigh Valley Trust Company v. Central National Bank of Jacksonville, 409 F.2d 989 (5th Cir. 1969), which relied on Tcherepnin v. Knight, 389 U.S. 332, 338, 88 S.Ct. 548, 554 (1967) and S.E.C. v. National Securities, Inc., 393 U.S. 453, 89 S.Ct. 564 (1969), and see Llanos v. United States, 206 F.2d 852, 854 (9th Cir. 1953), showing that this is not in conflict with the idea that criminal statutes must be strictly construed considering that this construction carries out the Congressional intention as to the Securities Act.

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3. (continued)

> any interest or instrument commonly known as a "security".
>
> And I instruct that if you find that there was a letter of commitment dated on or about December 2nd, 1965, signed by Darel D. Martin for the Lincoln Mortgage Company, Incorporated, that as a matter of law such a letter of commitment is a "security" within the meaning of the foregoing definition.

The term "evidence of indebtedness" is not limited to a promissory note or other simple acknowledgment of a debt owing and is held to include all contractual obligations to pay in the future for consideration presently received. See Keller v. City of Scranton, 325 Pa. 337, 49 A. 781, 782 (1901), and Nelson v. Wilson, 81 Mont. 560, 264 P. 679, 682 (1928).

Although there is little authority under the Securities Act or the Securities and Exchange Act, the construction given to the term "security" in the Stolen Property Act, 18 U.S.C. § 2311, recognizes the property right aspect of this term.[4]

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4. Merrill v. United States, 338 F.2d 763, 769 (5th Cir. 1964), wherein it was said:

> Each of the "securities" specified in § 2311 consists of a single document which in itself is sufficient to establish a given right, relationship, or property interest.

Similar views were expressed in United States v. Jones, 182 F. Supp. 146, 149 (W.D. Mo. 1960). In that case it was said:

> [W]e think the term "evidence of indebtedness" has reference to some individual printed or written instrument for the transfer or payment of money, that contains on its face evidence of an obligation as to which some innocent person would act in relation to the terms thereof. . . .

The Ninth Circuit quoted this language with approval in Pollack v. United States, 317 F.2d 619 (9th Cir. 1963).

It is true that the letter of commitment is not an indicium of debt in the same sense as is a promissory note, but as used in the Securities Act no such restriction is appropriate. In last analysis, this letter of commitment was sold for a substantial consideration, and the buyer received what appeared to be an enforceable obligation which contemplated the flow of funds. It indicated a binding and legally enforceable right. Therefore, we can find no fault with the ruling of the trial court insofar as it regarded the letter of commitment as plainly being a security.

The remaining question is whether the trial court should nevertheless have put the issue to the jury. The Fifth Circuit has held that it was reversible error to fail to do so under conditions which were not substantially distinguishable. Roe v. United States, 287 F.2d 435, 440 (5th Cir. 1961). On the other hand, the Supreme Court has recognized the right of a trial court to determine as a matter of law that a security is a security where it is such on its face. Securities and Exchange Commission v. C. M. Joiner Leasing Corporation, 320 U.S. 344, 351-353, 355 (1943), and our court in a civil case has gone so far as to hold that it was error for the trial court to submit the question

to a jury. Ahrens v. American Canadian Beaver Co., 428 F.2d 926, 928 (10th Cir. 1970).

It is unquestionably desirable to submit all issues in a criminal case to the jury and to fail to do so, even where the issue appears clear to the judge, is potentially dangerous and at best hazardous. See the discussion of Professor Moore, 8 Moore's Federal Practice 30-11, § 30.05 in which the author discusses the Supreme Court's decision in Horning v. District of Columbia, 254 U.S. 135 (1920), wherein the Court in an opinion by Mr. Justice Holmes went to an extreme length in upholding a judgment where the trial court had practically directed a verdict of guilty.[5]

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5. Mr. Justice Holmes wrote:

> * * * The facts were not in dispute, and what he did was to say so and to lay down the law applicable to them. In such a case obviously the function of the jury if they do their duty is little more than formal. The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found, and he can do the same none the less when the facts are agreed. If the facts are agreed the judge may state that fact also, and when there is no dispute he may say so although there has been no formal agreement. Perhaps there was a regrettable peremptoriness

The facts in our case are not comparable with those involved in Horning in which virtually the entire issue was taken away from the jury. Nevertheless, we are not to be understood as approving action of a trial court in failing to go through the motions at least of submitting the issue to the jury even though the question appears to him to be palpably lacking in factual character. At the same time, in this six-week trial involving 7,000 pages of testimony and hundreds and hundreds of exhibits, establishing guilt beyond all reasonable doubt, we do not believe that reversal would be justifiable.

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5. (continued)

> of tone--but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts--and that is all there was left for them after the defendant and his witnesses took the stand. If the defendant suffered any wrong it was purely formal since, as we have said, on the facts admitted there was no doubt of his guilt. 254 U.S. at 138-139.

The Ninth Circuit has an approach not unlike that taken in Horning. See its opinion in Lyons v. United States, 325 F.2d 370 (9th Cir. 1963).

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VI.

Nor do we see error in the trial court's reserving ruling on the motion for acquittal which was interposed at the conclusion of the government's case. The cases considering the issue have uniformly held that such action is not prejudicial where the evidence sustains the allegations of the indictment at the time the government rests. See United States v. Day, 438 F.2d 121 (5th Cir. 1971); Sullivan v. United States, 414 F.2d 714 (9th Cir. 1969), Montoya v. United States, 402 F.2d 847 (5th Cir. 1967); Moore v. United States, 375 F.2d 877 (8th Cir. 1967); United States v. Godel, 361 F.2d 21 (4th Cir. 1966); and Weathers v. United States, 322 F.2d 566 (9th Cir. 1963). Cf. United States v. Wininger, 427 F.2d 1128 (6th Cir. 1970). As was pointed out by the court in Weathers, supra:

> Assuming that it is error to reserve ruling on a motion for acquittal at the conclusion of the Government's case, and assuming the error was not waived by the introduction of evidence in defense, such error could not possibly be considered prejudicial unless the evidence was such that the court should have granted the motion. Prejudice does not exist here.
> 322 F.2d at 568.

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We have not overlooked defendants' contention that prejudice is shown in connection with the multiple counts based on one factual transaction but on numerous mailings. Each of these gives rise to a separate offense.[6]

The judgments are affirmed.

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6. It was long ago held by the Supreme Court that the passage of the Securities Act, specifically 15 U.S.C. § 77q, did not by implication repeal the mail fraud statute. Edwards v. United States, 312 U.S. 473, 483-484 (1941). The use of the mails is only incidental and jurisdictional to the securities offense, Little v. United States, 331 F.2d 287, 292 (2d Cir. 1964), whereas it is the gist of a § 1341 offense. United States v. Blosser, 440 F.2d 697, 699 (10th Cir. 1971). This circuit has held that each mailing constitutes a separate offense under the mail fraud statute even though only one scheme is involved. Marvin v. United States, 279 F.2d 451, 454 (10th Cir. 1960); Milam v. United States, 322 F.2d 104, 109 (5th Cir. 1963). What is prohibited is the creation of several mail fraud crimes based on the mailing of a single letter. Marvin v. United States, supra, 279 F.2d at 453.

Likewise, the passage of Horwitz and the commitment fee in interstate commerce (18 U.S.C. § 2314(2)), and the placing of a telephone call or telegram in pursuance of the fraud (18 U.S.C. § 1343), constituted separate offenses.

APPENDIX TO UNITED STATES OF AMERICA v.
WENDELL WARREN AUSTIN, et al.
Nos. 72-1016 through 72-1019

SUMMARY OF THE SIMILAR OFFENSE EVIDENCE

The largest part of the trial, of course, was taken up with evidence regarding other offenses. The government introduced a tremendous volume of similar offense evidence in an attempt to show a continuing plan or scheme, with full participation by all defendants in the overall scheme even though the participation of particular individuals in any single transaction may have been only peripheral.

The usual pattern of the similar offenses was as follows:

> (1) Through different media, ranging from advertisements in The Wall Street Journal to local word of mouth, defendants would attempt to interest both mortgage brokers and potential seekers of mortgage money for their own purposes in coming to one of defendants' various corporations.[1]

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1. We have compiled a list of corporate names utilized by the defendants, and the two deceased participants, Martin and Childs; it is not exhaustive, but indicates the great number of organizations among which the fund-seekers were shuffled by the defendants:

Childs was directly involved in:	Lincoln Mortgage and Prudential Corporation of America
Bales	Lincoln Mortgage and Prudential Corporation of America
Martin	Lincoln Mortgage and Prudential Corporation of America

The above three also were involved in unauthorized use of the name of the Foundation Life Insurance Corp. of Atlanta, Georgia.

(2) The most frequently used corporate vehicle for initial dealing was Lincoln Mortgage Corporation. At the outset defendants would request the "applicant" to furnish a "loan package" consisting of data on the proposed use for the money.

(3) The "loan package" was invariably approved, although sometimes not until the "applicant" had gone through several submissions and perhaps through lengthy "evaluation" sessions with one or more of the defendants.

(4) When the "applicant" was notified that his "package" or application had been approved, he was also told the cost of the loan, which varied between one and ten percent of the total amount.

(5) At some point in the process, usually before payment of the fee, advice was given as to the loan's being a "stand-by" or "take-out" commitment, whereby Lincoln Mortgage (or the corporation with which the "applicant" was dealing) was agreeing to pick up the loan on a long-term basis (ten to

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1. (continued)

Austin	Lincoln Investment Co.; World Funding Corp.; Lincoln Mortgage Co. (held no formal office therein, but was described in much testimony as being involved with the corporation)
Savidge	Savidge and Associates; American Finding (or Funding) Corporation; Premium Finance Corporation, First National Financial Corp.
Beeman	Executive Title and Investment (or Trust) Company; Western Title Insurance Co.

twenty years), but only after the passage of some months, usually twelve to twenty-four, after the making of the agreement.

(6) The "applicant" would then generally inquire as to where he was to get the money in the meantime to pay builders and the like (the projects were usually of such a nature that no bank would be willing to assume the risk).

(7) In response to this inquiry, defendants would promise to arrange interim financing, usually for an additional fee to be paid the interim financer. Sometimes a less devious approach was used, whereby the letter of commitment stated that it was for a standby commitment which would only become effective upon the completion of the project in question; this left the "applicant" to procure his own interim financing, a fact which he generally did not realize until too late.

(8) The "interim financer" was always one of the other defendants, including a Mr. Beamer of Baltimore who was a co-defendant not involved in the Horwitz transaction. Usually a fee was actually paid for the interim financing, although some victims had become too suspicious by this stage of the proceedings to put in more money. In any event, no interim financing was ever forthcoming.

(9) Of course, no "take-out" financing was ever forthcoming, either. Various ploys were used to stall and quiet the fears of the "applicant". He was shifted around from corporation to corporation from California to Vermont, pursuing missed deadlines, securing eleventh-hour extensions on closings, and the like. Eventually, many gave up the battle, secured other financing (or lost the project in which they were involved), and forgot about defendants. Some, however, filed civil suits against various defendants; these suits were generally successful as far as obtaining judgments, but unsuccessful in satisfying these.

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(10) Ordinarily there was no restitution of fees paid. There were isolated instances of some restitution, however; this was usually partial, occasionally complete, and invariably greatly delayed.

No purpose would be served by outlining each of the numerous other transactions presented at trial. We have reviewed the Appendix (consisting of twenty-seven volumes) as presented to us, and evaluated the evidence presented. It fully supports the existence of an ongoing, carefully designed scheme to defraud persons seeking equity capital or mortgage money.

Different individuals played central roles in the various transactions disclosed in the testimony. Thus, while in the instant Horwitz transaction the central characters were Bales and Savidge, with Beeman and Austin playing lesser roles, the reverse was frequently true. For illustrative purposes, there follows a listing of other transactions together with an indication of which defendant or defendants played a major role therein:

A. The Montgomery transaction (designated by the Government as KC #14), which went on roughly from February 1964 to March 1965. Austin played the central role here, acting for Lincoln Mortgage.

B. The Saxton transaction (KC #63), April 1964 to May 1965; Bales was primary, acting for Lincoln Mortgage.

C. The Langner transaction (KC #64), June 1964 to December 1965. Bales was central. Martin also participated, as did Childs.

D. The Jones, Jones & Hobbs transaction (KC #1), April 1964 to April 1967. This extensive transaction centered around Bales and Austin, with Beeman playing a small but important part. Martin participated, as did Childs.

E. The Torgler transaction (KC #60), December 1964 to June 1966. This transaction involved most of the defendants, but seemed

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particularly to concern Bales and Savidge. Childs, Martin and Austin also took part.

F. The Okamoto transaction (KC #15), May 1965 to November 1965. Centered around Austin and Savidge. Bales also took part.

G. The Sirotin transaction (KC #3), June 1965 to September 1966. Particularly involved Bales and Savidge. Martin and Childs also took part.

H. The Cadenhead--LaFargue transaction (KC #66), August 1965 to April 1966. Centered around Savidge, with Martin and Childs participating.

I. The Haag transaction (KC #22), October 1965 to October 1966. Centered around Bales, with Martin and Childs participating.

J. The Williams--Rentner transaction (KC #24), April 1966 to July 1967. A substantial transaction in which Bales and Savidge were important; Childs and Martin played some part.

K. The W.A.A. Oil transaction (KC #27), Fall 1966 to June 1967. A large transaction most directly influenced by Bales and Beeman, with Martin participating.

L. The Glen Dornie transaction (KC #27), October 1966 to July 1967. Of the present defendants, Beeman was essential to this transaction, which again was fairly extensive. Bales, Childs and Martin also participated.

M. The Jackson Nursing Home transaction (KC #48), December 1966 to November 1967. Particularly involved Bales and Savidge, with Martin participating.

N. The Foundation Life Insurance Co. series (KC #56), February 1967 to April 1967. This series of events centered around Bales and Savidge, with Martin and Childs being involved.

The government introduced evidence relating to
merous other incidents and transactions as well, but the
regoing list includes only those which can be regarded
more important and fully supported. The central role
the overall scheme was carried out by the decedent
ilds, but this fact does not detract from the contributions
the named defendants. They were shown to have knowingly
d intentionally participated in the activities charged
the indictments.

APPENDIX C

JULY TERM - AUGUST 7, 1972

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges, and Honorable Howard C. Bratton, District Judge.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Nos. 72-1016
	)	72-1017
WILLIAM E. BALES, JR.,	)	72-1018
WENDELL WARREN AUSTIN,	)	72-1019
CHARLES ALLEN SAVIDGE, and	)	
IRVING WELLESLEY BEEMAN,	)	
	)	
Defendants-Appellants.	)	

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellants in the captioned cases.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Lewis and Doyle and District Judge Bratton, to whom the cases were argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

APPENDIX D

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

15 U.S.C. 77(b). When used in this subchapter, unless the context otherwise requires --

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 U.S.C. 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly --

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a

material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in Section 77c of this title shall not apply to the provisions of this section.

18 U.S.C. 2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

DV

18 U.S.C. 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Fifth Amendment to the Constitution of the United States:

"AMENDMENT V -- CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

be taken for public use, without just compensation."

Sixth Amendment to the Constitution of the United States:

"AMENDMENT VI -- JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Eighth Amendment to the Constitution of the United States:

"AMENDMENT VIII--EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."